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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN CIVIL LIBERTIES UNION/EASTERN MISSOURI FUND, a not-for-profit corporation, and LARRY KATZENSTEIN and JOYCE ARMSTRONG, as representatives of the AMERICAN CIVIL LIBERTIES UNION, EASTERN MISSOURI, an unincorporated association,

Petitioners,

vs.

B. STEPHEN MILLER, III,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED

1. Can a state, consistent with the First and Fourteenth Amendments to the United States Constitution, apply a blanket prohibition against dividing legal fees with a non-lawyer to deny an American Civil Liberties Union affiliate the right to receive the proceeds of a federal judgment for counsel fees awarded under 42 U.S.C. § 1988 to the plaintiff in an ACLU-sponsored case?

2. Does 42 U.S.C. § 1988 represent a national policy that preempts a state's conflicting rule prohibiting lawyers from dividing legal fees with non-lawyers?

LIST OF PARTIES

Petitioners before this Court are the American Civil Liberties Union/Eastern Missouri Fund (hereinafter the "Fund"), a not-for-profit corporation, and Larry Katzenstein and Joyce Armstrong, as representatives of the American Civil Liberties Union, Eastern Missouri (hereinafter "ACLU/EM"), a non-profit unincorporated association. The ACLU/EM is an affiliate of the American Civil Liberties Union, a New York corporation. Respondent B. Stephen Miller, III, is an individual.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

Petitioners American Civil Liberties Union/Eastern Missouri Fund ("Fund"), a not-for-profit corporation, and Larry Katzenstein and Joyce Armstrong, as representatives of the American Civil Liberties Union, Eastern Missouri ("ACLU/EM"), an unincorporated association, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri entered February 7, 1991.

OPINIONS BELOW

The opinion of the Supreme Court of Missouri is as yet unreported and is reprinted in the Appendix (A-1). The opinion

of the Missouri Court of Appeals is unreported and is reprinted in the Appendix (A-30). The orders of the Court of St. Louis County are unreported and are reprinted in the Appendix (A-38).

JURISDICTION

The Supreme Court of Missouri entered its judgment on February 7, 1991. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Constitution of the United States, Amendment 1, provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances.

The Constitution of the United States, Amendment 14, provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . ..

The Constitution of the United States, Article VI, Clause 2, provides in pertinent part:

> [T]he laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 1988, 42 U.S.C., provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 484.150.1 R.S.Mo. 1986 provides:

> It shall be unlawful for any licensed attorney in the state of Missouri to divide any fees or compensation received by him in the practice of law or in doing law business with any person not a licensed attorney or any firm not wholly composed of licensed attorneys, or any association or corporation, and any person, firm, association or corporation violating this section shall be deemed guilty of a misdemeanor and upon conviction therefor shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars and costs of prosecution, which fine shall be paid into the treasury of the state of Missouri.

Rule 5.4(a) of the Rules of Professional Conduct provides in pertinent part:

> A lawyer or law firm shall not share legal fees with a nonlawyer . . ..

DR (Disciplinary Rule) 3-102 of the Code of Professional Responsibility provides in pertinent part:

> A lawyer or law firm shall not share legal fees with a nonlawyer . . ..

STATEMENT OF THE CASE

The American Civil Liberties Union, Eastern Missouri ("ACLU/EM") is a Missouri not-for-profit association whose purposes include nurturing civil liberties and promoting or

opposing legislation affecting civil liberties. It was organized in 1918 as the St. Louis Civil Liberties Committee. It has been an affiliate of the American Civil Liberties Union, a New York corporation since the 1920's (Answer No. 11 to Respondent's Interrogatories, L.F. 94, 115-116).[1] Petitioners Larry Katzenstein and Joyce Armstrong are the ACLU/EM's representatives in this suit.

Petitioner American Civil Liberties Union, Eastern Missouri Fund ("ACLU Fund") is a tax-exempt, not-for-profit charitable Missouri corporation whose purposes include the nurturing of civil liberties. It was incorporated in Missouri on October 26, 1966 (Answer No. 7 to Respondent's Interrogatories, L.F. 91-92, 114). The ACLU Fund advances money to ACLU/EM for litigation costs, including salaries. When attorney's fees are received by ACLU/EM, fees are paid over to the ACLU Fund to reimburse it for money advanced by the ACLU Fund to the ACLU/EM (Answers 10 and 25 to Respondent's Interrogatories to Petitioners; L.F. 93-94, 101-102, 115-117).

Respondent Miller is a lawyer. He graduated from Harvard Law School in 1981 and began working for the ACLU/EM in 1982 as a full-time, salaried staff attorney (Miller Depo. pp. 4, 6-8, 90; Answers Nos. 10 and 18 to Respondent's Interrogatories, L.F. 93-94, 97-98, 115). One of his duties as staff attorney was to serve as counsel in cases sponsored by the ACLU/EM (Miller Depo. p. 15). As a staff attorney, he was "encouraged to apply for and receive awarded fees to be paid by opposing parties," and under ACLU/EM policy "all such fee awards must immediately

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[1]The Legal File is in two volumes. One volume is entitled "Legal File" and will hereinafter be referred to as "L.F." The other volume is entitled "Exhibits to Legal File" and will hereinafter be referred to as "Exs. L.F." The depositions of Respondent Miller and Joyce Armstrong were separately filed and are referenced in this brief by specific deposition page references, such as "Miller Depo. p. ___" and "Armstrong Depo. p. ___."

be paid over to the ACLU/EM" (Exhibit 1, paragraph 2, to Miller Depo. at pp. 11-12; Exs. L.F. 1-1).

Miller fully understood that any attorney's fees he received were to be turned over to the ACLU/EM (Miller Depo. p. 20.) He was present when this policy was discussed and approved and he raised no objections (Miller Depo. pp. 73-81; Exhibits 12-15 to Miller Depo.; Exs. L.F. 12-1 to 15-2). In accordance with the policy, and in at least two cases arising before the instant dispute, legal fees awarded for Miller's legal services were turned over to the ACLU/EM. In one case, the fee check was made payable to him, and he endorsed the check and paid it over to the ACLU/EM. In another case, the fee check for his services was made payable to his co-counsel who turned it over to the ACLU/EM with Miller's knowledge and consent (Miller Depo. pp. 19-20, 105-107; Answer 25 to Respondent's Interrogatories to Petitioners; L.F. 101-1102, 116-117).

In 1984 Petitioner ACLU/EM undertook the sponsorship of an action on behalf of one D.C. against the City of St. Louis and other defendants in the United States District Court for the Eastern District of Missouri. Jurisdiction was invoked under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 1983. The suit challenged the city's "masquerading" ordinance, punishing a person who appeared in public "in a dress not belonging to his or her sex . . ." (Exs. L.F. 5-1 to 5-26).

The plaintiff in that case signed a "retainer agreement" in which he stated that he sought the services of ACLU/EM in the pursuit of his legal objectives. The pertinent provisions of the agreement were as follows:

> I understand that I am represented by the lawyer named above, not the ACLU/EM although the ACLU/EM is sponsoring my case.
>
> . . . .

> The services of the lawyer will be provided to me free of charge . . ..
>
> If my case is successful, the court may require the opponents to pay attorneys' fees and costs. *I agree that any such award of fees or costs shall be paid in full to the ACLU/EM immediately upon my receipt of such award.* ACLU/EM and I agree that I will retain any damages awarded to me after ACLU/EM is reimbursed for any costs not awarded to it by the court . . ..
>
> . . . .
>
> I also understand that I am free at any time to discharge the lawyer representing me (subject to court approval). However, if I choose to discharge my lawyer, the ACLU/EM is under no obligation to find a replacement or to continue its sponsorship of my case. Continued ACLU involvement in my case will be determined after consideration of all the circumstances that may exist at the time. (Emphasis supplied.)

The agreement listed the lawyer selected by the ACLU/EM as "Ms. Arlene Zarembka," an attorney in private practice in St. Louis (Exs. L.F. 3-1 to 3-3). Respondent Miller later joined Ms. Zarembka as co-counsel. He signed the pleadings along with Zarembka, styling himself "Staff Counsel, ACLU/EM" (Exs. L.F. 5-1 to 5-26).

The litigation resulted in a judgment declaring that the ordinance violated the federal constitution. Respondent and Zarembka then prepared an application for attorneys' fees as authorized by the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, setting out in detail their legal services rendered, including the number of hours each spent on the case (Exs. L.F. 6-1 to 6-3, 7-1 to 7-5). On August 20, 1985, before the application was ruled on, the defendant resigned his employment with ACLU/

EM (Exs. L.F. 18-1). On September 25, 1985, the court sustained the application in an order which stated that "*plaintiff* [D.C.] is awarded $15,501.25 in attorneys' fees and $2,729.90 in reasonable costs." (Emphasis supplied.) In an accompanying memorandum the court stated that $7,411 was awarded for Zarembka's services and $8,090.25 for Respondent's services (Exs. L.F. 8-2 to 8-7).

Thereafter Respondent Miller talked to D.C. on the telephone but said nothing to him about the fact that D.C., not Miller, was awarded the money for legal fees. Nor did Miller discuss with D.C. Miller's then professed ethical concerns about whether this money could be turned over to Petitioners (Miller Depo. pp. 36-39). After, the telephone call and after the $8,090.25 was awarded to D.C. by the Court, Miller called and wrote the St. Louis City Counselor's Office and requested that the check for the fee be made payable solely to him, rather than to D.C., the recipient of the court-ordered award, and that the check be sent directly to Miller (Miller Depo. pp. 29-33, 42-45). The City acceded to his request and sent Miller a check for $8,090.25 payable to him. Although Miller knew that his contract required him to endorse the check and turn it over to the ACLU/EM, he simply cashed the check and pocketed the money. Thereafter, Petitioners demanded that Miller turn the fee over to them or they would sue. Miller refused the demand and on April 5, 1987, this suit was filed in the Circuit Court of St. Louis County, Missouri (Miller Depo. p. 63; L.F. 1).

The Petition in the circuit court alleged that Respondent had a contractual obligation as an employee to pay over the $8,090.25; that Respondent refused to pay that sum over because he contended that to do so would violate Missouri's prohibition against fee-splitting; and that the Missouri law on fee-splitting was not violated by Petitioners' contract with Respondent, but that if it was, the Missouri law on fee-splitting as applied to public interest First Amendment organizations, such as Petitioners,

violated their "First and Fourteenth Amendment rights under the United States Constitution to freedom of speech, to freedom of association and to petition the government for a redress of grievances." The Petition stated that such a law or rule "would have a chilling effect on the aforesaid rights [of petitioners] and prevent [them] from carrying out [their] purposes, including the effective promotion, nurturing and defending of civil liberties as established by the United States Constitution and the Bill of Rights" (L.F. 138, 80, 73-74).[2]

The trial judge, the Honorable Bernhardt C. Drumm, Jr., without opinion, sustained Petitioners' Motion for Summary Judgment and denied Respondent's Cross-Motion for Summary Judgment (Appendix A-38 to A-40). The Missouri Court of Appeals, Eastern District, reversed and held that Respondent was entitled to summary judgment (Appendix A-30). The court of appeals held that Miller's contractual obligation to turn the fee over to Petitioners was void and prohibited by state law banning fee-splitting between a lawyer and nonlawyer (Appendix A-34). Rejecting Petitioners' contention that state law as here applied violated the First and Fourteenth Amendments to the United States Constitution, the court, in a footnote and without discussion, held Missouri's law constitutional and specifically declined to follow the reasoning of this Court's decision in *In re Primus*, 436 U.S. 412 (1978) (Appendix A-34). On Petitioners' application, the Supreme Court of Missouri granted transfer to that court "because of the general interest and importance of the issue presented" (Mo. Const. Art. V, § 10; Appendix A-1).

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[2] The original suit was filed by the Fund alone and was in three counts: breach of contract, conversion and unjust enrichment. In two Amended Petitions the ACLU/EM was added as a party plaintiff. Each amended petition raised the constitutional issue in the same fashion as the original petition (L.F. 80, 73-74).

The Supreme Court of Missouri, in a 5-2 decision, held that Respondent Miller, not Petitioners, was entitled to summary judgment. The court noted that the fee award motion was filed "on behalf of D.C. pursuant to 42 U.S.C. § 1988" and that the motion asked, and the federal district court ordered, that the award be made to D.C., not to Miller personally. The court went on to state, however, that Missouri statute § 484.150.1 R.S.Mo. 1986 makes it "unlawful for any licensed attorney . . . to divide any fees . . . with any person not a licensed attorney" and that Missouri Rule of Professional Conduct 5.4(a) (formerly disciplinary Rule 3-102) states that "a lawyer . . . shall not share legal fees with a non-lawyer." Rejecting Petitioners' contention that there was no fee-splitting in this case, the court then held that "[t]hough there is little Missouri authority construing this statute or this rule, without question" both the statute and rule made Miller's binding contractual obligation to turn the fee over to Petitioners unenforceable and illegal (Appendix A-2 to A-5).

The court also specifically rejected Petitioners' contention that the application of Missouri's fee-splitting prohibition to the facts of this case violated Petitioners' freedom of association and expression guaranteed by the First and Fourteenth Amendments. In particular, the court held that this Court's decisions in *NAACP v. Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978), were not in point and that there was "no [federal] constitutional authority to strike down the firm policy of our state . . . against fee-splitting" (Appendix A-6). Indeed, the court's opinion apparently applies to all "nonprofit groups" and all "public interest groups" without qualification (Appendix A-5 to A-6).

The Chief Justice of the State of Missouri, the Honorable Charles B. Blackmar, dissented.[3] In a 25-page opinion, he stated

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[3] Judge Robertson dissented without opinion.

that he was "shocked" by Respondent's "dishonorable conduct" of "help[ing] himself to the money" when he had a clear and lawful contractual obligation to turn the money over to Petitioners (Dissent, Appendix A-12, A-13, A-16).[4] Chief Justice Blackmar went on to state that "the fair intendment of *NAACP v. Button* . . . and *In re Primus* . . . clearly supports the plaintiffs' [Petitioners'] position" that Missouri's fee-splitting rule and statute violate Petitioners' First Amendment rights, and that Missouri law on fee-sharing must give way to, and is preempted by, the national policy to vindicate civil rights which is inherent in 42 U.S.C. § 1988. The "Supreme Court of the United States has regularly struck down state statutes or rules governing the legal profession when they conflict with federal law[5] (dissenting opinion, Appendix A-19, A-20).

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[4] The majority opinion states that the court is not determining the ethical conduct of Respondent (Appendix A-3, at note 1). Respondent's conduct is clearly unethical. Rule 1.15 of the Missouri Rules of Professional Conduct requires a lawyer, upon "receiving funds . . . in which a client has an interest . . .[to] promptly notify the client," to "promptly render a full accounting," and to keep "the portion in dispute . . . separate . . . until the dispute is resolved." Respondent did none of these things. Indeed, as he has admitted, he kept the money for himself and told his client nothing about the fee award (Miller Depo. pp. 36-39, 63).

[5] As authority for this proposition, Chief Justice Blackmar cited: *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971) (labor union has a First Amendment right to recommend specific attorneys to its members and limit their fees); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (labor union has a First Amendment right to hire attorneys to serve its members in individual cases); and *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964) (labor union has First Amendment right to recommend specific attorneys to its injured members).

REASONS FOR GRANTING THE WRIT

The Supreme Court of Missouri has decided important questions of federal and constitutional law in conflict with applicable decisions of this Court and the congressional policy underlying 42 U.S.C. § 1988.

The Importance of the Decision Below

At stake here is the life-blood of those many public interest groups "of whatever hue of the political spectrum" (dissenting opinion, Appendix A-22) that use litigation "to petition the Government for redress of grievances" within the meaning of the First Amendment.

It has been estimated that court-awarded fees account for about nine percent of all income to nonprofit groups that sponsor public interest litigation (N. Aron, *Liberty and Justice for All: Public Interest Law in the 1980's and Beyond* 39-40, 46 table 2.6). Civil liberties associations, such as Petitioner ACLU/EM, which have for their purpose the nurturing of civil liberties guaranteed by the First Amendment, need these fees to maintain their vitality and hence to provide counsel to help maintain the vitality of the Bill of Rights itself. Indeed, the decision below places in jeopardy funding for all public interest groups since the court, without qualification, held that Missouri's fee-splitting prohibition applies generally to "public interest" and "nonprofit" groups (Appendix A-5 to A-6).

Moreover, the fee-splitting rule interpreted by the court below is in force in virtually every jurisdiction in the Union, and an empirical survey has suggested that there are conflicting views in other states over the applicability of the fee-sharing prohibition to public interest organizations. Maine, for example, takes the same position as Missouri, while Florida and Nebraska generally allow a public interest organization to share fees with cooperating and staff attorneys (Simon, *Fee-Sharing Between*

Lawyers and Public Interest Groups, 98 Yale L.J. 1069, 1071-73, especially notes 8, 13 and 14 (1989)). Questions about the fee-sharing rule are likely to continue in public interest litigation until there is a definitive decision by this Court (*see* Simon at p. 1073).

To hold, as the court below did, that a nonprofit, public interest, civil liberties group is subject to rules of ethical conduct that reward the sort of faithless conduct engaged in by Respondent is a breath-taking decision that protects "no state interest, compelling or otherwise" and which "makes organizations . . . which sponsor civil rights litigation less able to serve their constituencies . . .." (dissenting opinion below, Appendix A-21 to A-22).

The decision below frustrates a "national policy" in favor of civil rights litigation and the organizations that sponsor such litigation (dissenting opinion, Appendix A-14). As Chief Justice Blackmar stated, the "[c]ases are legion in which awards have been made for the services of salaried attorneys when all counsel clearly understand that the award will be paid over to the employer" (dissenting opinion, Appendix A-15), and in no such case did the court awarding the fee suggest that "there is the least impropriety in so doing" (*ibid.*). For example, in *Fairley v. Patterson*, 493 F.2d 598, 605-606 (5th Cir. 1974), the court held that an award of attorneys' fees should not be reduced because staff counsel did the legal work and the fee award would be "directly channelled into the coffers of the Ford Foundation." Indeed, in some federal cases, the court has ordered that a fee award go directly to the sponsoring civil liberties organization and the lawyer has been bypassed. *Brandenburger v. Thompson*, 494 F.2d 885, 889 (9th Cir. 1974) ("Of course, the award should be made directly to the organization [the ACLU] providing the services . . .."); *Wis. Socialist, etc. v. McCann*, 460 F. Supp. 1054, 1058 (E.D. Wisc. 1978) (reasonable fee awarded directly to the Wisconsin Civil Liberties Union Foundation, Inc., which spon-

sored the litigation); *Howard v. Phelps*, 443 F. Supp. 374, 377 (E.D. La. 1978) ("it is plain that the organization that employed Mr. Kellogg [attorney for plaintiffs], the American Civil Liberties Union, should receive the fees generated by Mr. Kellogg's services . . .").

The decision below is inconsistent with these cases and with a uniform course of judicial decision by the federal courts which encourage the sponsorship of civil rights litigation by public interest organizations. An authoritative decision by this Court is needed to clarify the scope of the First Amendment for organizations that seek to conserve the Bill of Rights.

The Conflict With the Applicable Decisions of the Court and the Congressional Policy Underlying 42 U.S.C. § 1988

1. The Constitutional Issue

In *NAACP v. Button*, 371 U.S. 415 (1963), this Court recognized that litigation of issues within the ambit of the Bill of Rights and the Equal Protection Clause is a form of political expression and association that is entitled to First Amendment protection against infringing state action. The NAACP maintained a staff of salaried attorneys who contacted victims of discrimination to determine their possible availability as plaintiffs. The state court held that this conduct of the staff attorneys violated ethical rules against soliciting lawsuits.

This Court reversed, holding that the state could not impose rules against solicitation as a barrier to a non-profit organization's pursuit of antidiscrimination actions. The Court observed that the state rules were designed to protect the public against predatory lawyers acting for their own economic benefit, and that their application to the activities of the non-profit NAACP was not necessary to serve any proper state purpose. The Court held that the First Amendment protected the NAACP's "entire arrangement," including its financial understanding with its staff

attorneys that they would receive a salary and therefore could "not accept, from the litigant or any other source, any other compensation for . . . [their] services in an NAACP-assisted case." 371 U.S. at 420, 442. That arrangement directly parallels the salary and fee policy at issue here. Miller was paid a salary but was not permitted to keep court-awarded fees he received.

The *Button* holding was applied to the ACLU's attorney fee policies in *In re Primus*, 436 U.S. 412 (1978). Edna Primus, a lawyer acting without compensation on behalf of the ACLU, contacted women who had been sterilized as a condition of receiving Medicare payments. Ms. Primus wrote a letter encouraging them to file suit challenging that practice as federally unconstitutional. The South Carolina Supreme Court disciplined Ms. Primus with a public reprimand for unethical solicitation. This Court reversed. Relying on *NAACP v. Button*, the Court held that the ACLU's activity of soliciting litigation was "a vehicle for effective political expression and association" protected by the First Amendment, and that South Carolina's broad general rule prohibiting solicitation was unconstitutional as applied to Ms. Primus because it limited "core First Amendment rights" without requiring proof in that case that it prevented "substantive evils." *Id.* at 431-433.

South Carolina contended that the ACLU's policy of requesting a post-trial award of attorney's fees took Ms. Primus' solicitation on behalf of the ACLU outside the reach of *Button*. The ACLU stood to make a profit by the solicitation, the state argued, whereas in *Button* the fee issue had not been raised. The Court emphatically rejected this contention. The "ACLU's policy of requesting an award of counsel fees does not take this case outside the protection of *Button*." *In re Primus*, 436 U.S. at 429 (1978). The possible monetary benefit to the ACLU was yet another reason to rule *for* Ms. Primus, not against her, the Court said, because a not-for-profit First Amendment organization, and not the attorney, would be rewarded for the solicitation. This

reduced the likelihood of abusive solicitation practices that this Court addressed and contrasted in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), decided the same day as *Primus*. In the Court's view, the possibility of profit to the ACLU from an award of attorney's fees was no different than the likelihood of increased contributions as a result of the same successful litigation. *In re Primus*, 436 U.S. at 430-431 (1978). As the Court had observed in *Button*, "the vital fact [is] that here *the entire arrangement* employs constitutionally privileged means of expression to secure constitutionally guaranteed civil rights." *Button*, 371 U.S. at 442 (emphasis supplied).

The reasoning in *Primus* and *Button* is fully applicable in the instant case. The ACLU's "sponsorship of litigation is motivated . . . by its widely recognized goal of vindicating civil liberties," and the possibility that an award of attorneys' fees may go into its central fund "offers no basis for equating the work of lawyers associated with the ACLU or the NAACP with that of a group that exists for the primary purpose of financial gain through the recovery of counsel fees." *Primus*, 436 U.S. at 430, 431. Quite clearly, then, the ACLU/EM's policy of requesting and keeping an award of counsel fees does not take this case outside the protection of *Primus* and *Button*.

Fee awards and solicitation are inextricably intertwined. A restriction on funding necessarily reduces the amount of free speech and expression because it reduces the number of cases the ACLU/EM can sponsor and for which it can provide counsel. *Cf. Buckley v. Valeo*, 424 U.S. 1, 18-19 (1976) (monetary contributions are a form of free speech). Both funding and solicitation are necessary components of the "entire arrangement" afforded First Amendment protection in *Button* and *Primus*. As to both, "[b]road prophylactic rules in the area of free expression are suspect." *Button*, 371 U.S. at 438; *Primus*, 436 U.S. at 432. Under *Primus* and *Button*, disciplinary rules on solicitation and fee-

sharing must be narrowly drawn to protect against a substantive evil without infringing on First Amendment rights.

Here, the fee-sharing rule, as interpreted by the court below, is not narrowly drawn and does not meet a substantive evil. The decision below serves "no state interest" (dissenting opinion, Appendix A-21). On the contrary, the interpretation of the law on fee-splitting is unreasonably broad and rewards a betrayal of trust by a member of the bar and has a dampening effect on a substantive good — litigation to protect First Amendment rights. *See* Simon, *supra* at 1121 ("fee-sharing arrangements fall within the protection of the First Amendment").

The history and rationale of the rule against fee-splitting suggest that it has no application here. The rule is designed to prevent ambulance chasing and to prevent commercial corporations from making a profit off of a lawyer's services. *See Mequire v. Corwine*, 101 U.S. 108 (1879) (nonlawyer who secured case cannot share in lawyer's fee); *ABA Canons of Professional Ethics*, Canon 28 (1908) (disreputable for a lawyer to pay a nonlawyer for bringing cases to the lawyer's office); Wormser, *Corporations and the Practice of Law*, 5 Fordham L.Rev. 207, 218 (1936) (citing statutes prohibiting corporations from practicing law). It was not designed to prevent charitable, public-minded organizations from pursuing litigation to conserve and protect the Bill of Rights. All of the potential concerns safeguarded by the fee-splitting rule are either not applicable here or are fully protected by other rules. *See* Simon, *supra* at 1105-1114. With regard to the key question of lay interference — that if fee-splitting is permitted, the non-lawyer will interfere with the judgment of the lawyer in the lawyer-client relationship — there is no evidence of such interference here, and in any event, that concern is already protected by Rules 1.2(a), 1.7, 1.8(f), and 5.4(c) of the Missouri Rules of Professional Conduct, which prohibit a lawyer from allowing lay interference with

professional judgment or the relationship with the client.[6] The question of lay interference has been held by this Court to be inapplicable in the present context. *NAACP v. Button*, 371 U.S. at 441, 442-444 (1963) (legitimate concerns about lay interference not applicable); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 223 (1967) ("very distant possibility" of lay interference insufficient to justify state's complete bar on union's right to hire attorneys on a salaried basis to assist its members).

The fee judgment here was awarded to the litigant pursuant to 42 U.S.C. § 1988. Federal courts have the authority, duty and opportunity to supervise litigation and make sure there are no ethical abuses involved before a judgment for attorney's fees is awarded. *See Primus*, 436 U.S. at 429-30 (noting the significance of court review). That protection is adequate in the present factual context to give the bench, the bar and the public the assurance that the Rules of Professional Conduct will be adhered to. *See* Simon, *supra* at pp. 1076-1083, 1105-1114. Chief Justice Blackmar was correct, therefore, in asserting that the opinion below articulates no compelling state interest to be served and that, indeed, there is no such interest, compelling or otherwise (dissenting opinion, Appendix A-21).

The effect of the decision below is also troublesome because, under *Primus*, public interest lawyers are permitted to solicit cases on behalf of their public interest organizations. Yet under the wooden interpretation of the fee-splitting rule upheld by the court below, those same lawyers are emboldened to confiscate the fees from those cases for their private financial gain. Such a

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[6] Rule 1.2(a) requires a lawyer to "abide by the client's decisions." Rule 1.7(b) prohibits a lawyer from representing a client if that representation will be "materially limited" by a third person. Rule 1.8(f) prohibits a staff attorney from taking a salary to represent others if the employer interferes with the lawyer's professional judgment. Rule 5.4(c) prohibits a lawyer from permitting the employer to regulate the lawyer's professional judgment.

topsy-turvy result not only encourages, rather than discourages, reprehensible professional conduct, it destroys a core First Amendment right of "collective activity undertaken to obtain meaningful access to the courts." *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971) (explaining the "common thread" in the Court's group legal services cases).

2. The Statutory Preemption Issue

The court below recognized that the fee award at issue in this case was awarded pursuant to the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, but incorrectly found that § 1988 was limited by Missouri's proscription against fee sharing (Appendix A-2, A-5). The dissenting opinion properly argued that Missouri's laws on fee-sharing were preempted by, and had to yield to, the national policy in favor of civil rights litigation promoted by § 1988 (Appendix A-22). Squarely presented by the opinion and dissent, therefore, is the question whether § 1988 preempts and overrides inconsistent state law. While the preemption issue was not briefed below, the necessary effect of the lower court decision was to deny any claims of federal preemption and that issue may therefore be reviewed in this Court. Where, as here, a federal constitutional question is clearly raised and decided below, this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) and may avoid the broader constitutional issue by deciding the case on a narrower federal statutory issue which is within the necessary effect of the decision below.[7]

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[7] *Boynton v. Commonwealth of Virginia*, 364 U.S. 454, 457 (1960) (court avoided two broad constitutional issues raised below and in the petition for certiorari by deciding case on a statutory ground not presented below or by the petition); *Wood v. Georgia*, 450 U.S. 261, 265 (1981) (Court will consider a due process issue not raised below rather than "decide a novel constitutional question that may be avoided"); *Fry v. United States*, 421 U.S. 542, 545 n.5

(Footnote 7 continued on next page)

Section 1988 allows the "prevailing party . . . a reasonable attorney's fee" in specified civil rights cases, including the underlying suit in this case. The principal purpose of this congressional enactment was to increase the availability of lawyers taking civil rights cases as an "integral part of the remedies necessary to obtain" compliance with federal civil rights laws. S. Rep. No. 94-1011, p. 5 (1976), U.S. Code Cong. & Admin. News 1976, p. 5912; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 3 (1976) ("[P]rivate lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so").

The decision below thwarts that principal purpose. If the fee-sharing rule allows staff attorneys to keep § 1988 fee awards, contrary to the contractual obligation owed by them to their public interest employers, First Amendment organizations such as the ACLU/EM, and many other public interest organizations, will be denied the right to establish a mutually agreeable relationship with a litigant who seeks judicial redress of a violation

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(Footnote 7 continued)

(1975) (Court dealt with statutory issue raised only in amicus briefs "[r]ather than decide a constitutional question when there may be doubt whether there is any statutory basis for it"); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-698 (1984) (question of statutory preemption considered although not decided below or raised by the parties); *Illinois v. Gates*, 462 U.S. 213, 248 (1983) (White, J., concurring) (modification of exclusionary rule properly before the Court where a violation of the Fourth Amendment raised below); *Dewey v. City of Des Moines*, 173 U.S. 193, 199 (1899) ("if the decision of the court [below], while not noticing the question, was such that the judgment was, by its necessary effect, a denial of the right claimed or referred to, it would be sufficient [for review by the Court]"); *Murdock v. Memphis*, 20 Wall 590, 628 (1875) (all federal aspects of a state court decision are reviewable by the Court); *see also* Rule 24.1(a) of the Court providing that "the Court may consider plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide;" Stern, Gressman and Shapiro, *Supreme Court Practice* §§ 3.24, 6.26 (6th Ed. 1986).

of the litigant's civil rights. The loss of this right directly conflicts with the congressional purpose for enactment of § 1988, which was to make certain that civil rights litigants are furnished legal services. The end result for public interest groups will be a loss of substantial revenue which will, in turn, cause such groups to lay off staff attorneys and will make it more difficult for them to educate the public, sponsor cases, file amicus briefs, train cooperating attorneys and carry on other activities. *See* Simon, *supra* at 1074-75.

When Congress enacted § 1988, it in effect gave to a litigant whose civil rights have been violated a voucher which the litigant could negotiate to obtain legal counsel. *See Venegas v. Mitchell*, ___ U.S. ___, 110 S.Ct. 1679, 1683 (1990) ("it is the party's right to waive, settle, or negotiate that eligibility" for a § 1988 award). Congress intended this litigation voucher to be valuable enough to enable a civil rights litigant "to attract competent counsel." *See Blum v. Stenson*, 465 U.S. 886, 897 (1984) (quoting from § 1988's legislative history). The litigant should be entitled to use the voucher to engage private counsel, a legal services organizations, a public interest group, or a First Amendment association such as the ACLU/EM. In exchange for the voucher, which has value only in the event that the litigant prevails, the public interest group sponsoring the case may then furnish the litigant a staff lawyer.

The decision below devalues this voucher by severely restricting its negotiability. As a practical matter, the voucher can no longer be used in Missouri to engage staff counsel employed by public interest groups dedicated to vindicating civil rights and civil liberties. As the dissent below aptly observed, and as this Court has stated, "Congress endorsed . . . decisions allowing fees to public interest groups when it was considering and passed [civil rights fee shifting laws]." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70 n.9 (1980) (discussing the fee award provision of Title VII, 42 U.S.C. § 2000e-5(k)); cited by the dissenting opinion below, Appendix A-14 at note 6.

The decision below is also inconsistent with the Court's conclusion in *Evans v. Jeff D.*, 475 U.S. 717 (1986), that § 1988 fee awards belong to the litigant and cannot be claimed by the litigant's lawyer. There, a Legal Aid staff lawyer challenged a defendant's right to condition a class action settlement on the plaintiff's waiver of any claim to a § 1988 fee. The Court upheld defendant's right because the plain language of § 1988, together with its legislative history, bestowed the fee award on the "prevailing party," not the party's lawyer, and therefore a prevailing party could waive any right to the fee. Such fee awards were "added . . . to the arsenal of remedies available to combat violations of civil rights." *Evans v. Jeff D.*, 475 U.S. at 732.

The decision below defuses one of the most important weapons in a plaintiff's civil rights arsenal. A litigant has been denied the right to assign a § 1988 fee award voucher to a public interest group in exchange for the assistance of staff counsel. Such a result is inconsistent with the plain language of § 1988 which provides for an award, not to the attorney, but to the "prevailing party" who can then use the proceeds of the award freely without interference from the party's attorney. *Cf. West Virginia University Hospitals, Inc. v. Casey*, 59 U.S. Law Week 4180 (U.S. March 19, 1991) (plain meaning of words "attorney's fee" in § 1988 excludes fees for experts). Nor does the legislative history of § 1988 indicate that Congress intended such a result since it clearly wanted to arm the civil rights litigant with the undiminished power to hire competent counsel. Such congressional interest does not restrict in any way the state's legitimate interest in assuring the public that lawyers will act ethically. That interest is adequately protected by numerous other rules of professional conduct that in no way impinge upon § 1988. *See* note 6, *supra* and accompanying text.

Section 1988 is one of the laws of the United States which is the "Supreme Law of the Land." *Article VI, Clause 2, United States Constitution.* Under the circumstances of this case, Section

1988 preempts and takes precedence over Missouri law on fee-splitting because that state law "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress" when it enacted § 1988. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Sperry v. State of Florida*, 373 U.S. 379 (1963); *see also County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1407, 1415 (E.D.N.Y. 1989) ("[T]o the extent the enforcement of a state ethics rule might frustrate congressional ends, the Supremacy Clause would be a bar to any such enforcement.").

Conclusion

For the reasons stated above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX

SUPREME COURT OF MISSOURI

en banc

No. 72837

AMERICAN CIVIL LIBERTIES UNION/EASTERN MISSOURI FUND, et al.,
Plaintiffs/Respondents,

vs.

B. STEPHEN MILLER, III,
Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT
OF ST. LOUIS COUNTY

Honorable Bernhardt C. Drumm, Jr.

The American Civil Liberties Union/Eastern Missouri Fund (Fund), joined by Larry Katzenstein and Joyce Armstrong, representatives of the American Civil Liberties Union, Eastern Missouri (ACLU), brought this action against B. Stephen Miller, III (Miller) to recover attorney's fees awarded while he was employed as a staff attorney for ACLU. Defendant appeals from the trial court's order denying his summary judgment motion and granting plaintiffs' motion for similar relief. Following reversal of the judgment in the court of appeals, the cause was transferred because of the general interest and importance of the issue presented, and is determined as though on original appeal. Mo. Const. art. V, § 10. We reverse and remand.

Miller, a practicing attorney, was hired at a monthly salary as ACLU's first staff counsel in 1982. ACLU required that any attorneys' fees he received while so employed would be "handed over to the organization." In 1984 and 1985, a federal civil rights action styled *D.C. and M.S. v. City of St. Louis*, No. 84-1152C(3),

was tried in the Eastern District of Missouri. This action, sponsored by ACLU, challenged a City of St. Louis ordinance, and Miller, as ACLU staff counsel, with Arlene Zarembka as a "cooperating" or "volunteer" attorney, represented D.C. and M.S. ACLU's agreement with D.C. required it to provide legal services free of charge, and in exchange, D.C. promised that any court "award of fees or costs shall be paid in full to the ACLU immediately upon my receipt of such award."

D.C.'s challenge to the ordinance was successful, and in June, 1985, Miller and Zarembka filed a "Motion for Attorneys' Fees and Costs" on behalf of D.C. pursuant to 42 U.S.C. §1988. That motion asked the district court to award D.C. (1) $35,765.00 for attorney fees based on services rendered by Miller and Zarembka and (2) $2,729.72 for costs advanced by ACLU.

On July 15, 1985, Miller resigned his position as ACLU staff counsel, effective August 23. On September 25, the district court ordered D.C.'s motion "granted so that [D.C.] is awarded $15,501.25 in reasonable attorneys' fees and $2,729.79 in reasonable costs." A memorandum accompanying the district court's order disclosed that the award was based on credit for Miller's work in the amount of $8,090.25 and Zarembka's with $7,411.00.

In early October, Miller contacted the City Counselor's office regarding the City's payment of attorney fees and costs pursuant to the district court's order. At his request, the City issued a separate check solely to Miller for $8,090.25 and a check for $2,729.79 to ACLU for costs.

ACLU demanded that Miller "hand over" the $8,090.25, asserting that Miller was contractually obligated so to do. Miller refused, insisting that such action would violate both the ethical prohibition against "fee-sharing" and § 484.150.1, RSMo 1986, but Miller offered to return to ACLU the proportion of his salary earned while working on the D.C. case. ACLU refused Miller's

offer, and instead commenced this litigation to recover the $8,090.25, pleading alternatively: (1) contractual obligation; (2) conversion; and (3) unjust enrichment.[1] The trial court sustained ACLU's motion for summary judgment on all counts and denied Miller's cross-motion for summary judgment.

In its first count, ACLU alleged Miller failed to fulfill his contractual obligation to deliver all awards of attorneys' fees to the organization. Countering this charge, Miller maintains the trial court erred in "granting plaintiffs' motion for summary judgment and in denying the cross-motion for summary judgment filed by defendant, because the unassailable proof established that defendant was entitled to judgment as a matter of law in that . . . Missouri public policy, Missouri statutory law and the canons of professional responsibility . . . prohibited defendant . . . from sharing with plaintiffs . . . any fees he received in the practice of law or in doing law business."

Initially, we note that "it is no longer necessary to support a motion for summary judgment by 'unassailable proof.' " *Defino v. Civic Center Corp.*, 780 S.W. 665, 667 (Mo. App. 1989). Summary judgment "shall be entered forthwith if the pleadings,

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[1] It should be emphasized that ACLU made no claim in its petition for return of any portion of the salary paid defendant; such was not an issue and was not decided in this case. Further, as noted above, appellant offered to refund a proportional share of the salary, but ACLU refused this offer and the issue fell from consideration. ACLU chose to plead and try an entirely different claim, attempting to enforce an illegal contract for fee-splitting. It was concerned not with recovering the salary paid but instead to enforce the illegal contract and in so doing abrogate the long-established rules of our profession which proscribe this condemned practice of lawyers splitting fees with nonlawyers. Further, the decision does not determine the so-called "ethical conduct" of appellant to which the dissent alludes, or any issue as to possible disputes between appellant and D.C. (or others) concerning the award of fees.

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 74.04(c).

The parties agree that there is no genuine issue of material fact; accordingly, our review is limited to determining whether, as between these parties, Miller was entitled to a judgment as a matter of law. It should be emphasized that, although the federal court's award was to D.C., he is not a party to this action, and therefore his right, if any, to the $8,090.25 is not here for consideration.

This brings us to an examination of the statutory and ethical prohibitions against fee-splitting. Section 484.150.1, RSMo 1986, provides:

> It shall be *unlawful* for any licensed attorney in the state of Missouri *to divide any fees* or compensation received by him in the practice of law or in doing law business *with* any person not a licensed attorney or any firm not wholly composed of licensed attorneys, or *any association* or corporation, and *any person*, firm, association or corporation *violating this section shall be deemed guilty of a misdemeanor* and upon conviction therefor shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars and costs of prosecution, which fine shall be paid into the treasury of the state of Missouri.

(Emphasis added.) Further, Disciplinary Rule 3-102, in effect at the time of the fee award at issue here, provided, with certain exceptions not applicable in this case, that "[a] lawyer or law firm shall not share legal fees with a non-lawyer."[2]

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[2]Current Rule 5.4 contains identical language. Exceptions in both rules, not applicable here, involve payments to a lawyer's estate or inclusion of non-attorney employees in a retirement plan, even though based on profit-sharing.

Though there is little Missouri authority construing this statute or the rule, without question they apply to the situation at bar. The Advisory Committee of the Missouri Bar Administration has so opined, stating in a letter of December 31, 1985, that "[i]t is the Committee's opinion that a staff attorney who is on salary to the American Civil Liberties Union and who is awarded attorneys fees cannot turn said fees over to the corporation."[3] This Court in *State ex rel. McKittrick v. C.S. Dudley & Co.*, 102 S.W.2d 895, 901 (Mo. 1937), noted that "[t]he public policy of this state as shown by the . . . statute prohibits the splitting of fees between an attorney and a lay agency." In a closely analogous situation, Missouri Bar Opinion No. 43 declared it impermissible for an attorney employed by a corporation on a salaried basis to request attorneys' fees when it was understood that the corporation desired the fee for its own use.

ACLU, however, relying on *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328 (1963) and *In Re Primus*, 436 U.S. 412, 98 S.Ct. 1893 (1978), urges we hold that application of the fee-splitting prohibitions to its organization would infringe its First Amendment rights. In *Button*, the United States Supreme Court held Virginia violated the First Amendment freedom of expression in *prohibiting* NAACP staff attorneys from *soliciting* prospective civil rights litigants and referring them to the NAACP legal staff. 83 S.Ct. 328. In *Primus*, 98 S.Ct. 1893, the Court similarly held South Carolina could not sanction a lawyer affiliated with the ACLU for *informing* a prospective civil rights litigant that legal assistance was available from ACLU. Though the State must tailor regulation so as not to abridge the associational freedom of nonprofit organizations such as the ACLU, *id.* at 1908, the prohibition against fee-splitting does not infringe upon First Amendment rights so as to violate the Constitution. Indeed, a

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[3] We note that some states have reached a contrary determination. *See* Simon, *Fee Sharing with Nonlawyers*, 98 Yale L. J. 1069, 1073 n. 14 (1989).

scholarly article by ACLU's trial counsel in this case concedes that "the Supreme Court has never expressly extended First Amendment protection to fee-sharing arrangements with non-profit groups." Simon, *Fee Sharing with Nonlawyers*, 98 Yale L. J. at 1121. Though the article presents the author's policy arguments why the fee-splitting prohibition should not be applied to public interest groups, we find no constitutional authority to strike down the firm policy of our state as declared by the legislature and by this Court in its rule against fee-splitting.

Assuming *arguendo* that Miller had a binding contractual obligation to return the fees to ACLU, we hold such agreement is unenforceable and ACLU's first count must fail. *See Faygal v. Shelter Insurance Co.*, 689 S.W.2d 724, 727 (Mo. App. 1985).

ACLU's second count, an action for conversion of the proceeds, fails for the simple reason that it had no enforceable right in the property. "In Missouri, in order to maintain a suit for conversion, the plaintiff must have title to, or a right of property in, and a right to the immediate possession of the property concerned at the time of conversion." *Twellman v. Lindell Trust Co.*, 534 S.W.2d 83, 97 (Mo. App. 1976); *See also Brede Decorating, Inc. v. Jefferson Bank & Trust Co.*, 345 S.W.2d 156, 164 (Mo. 1961). There is no genuine issue of material fact as to this essential element.

The third count alleges unjust enrichment, which occurs "where a benefit is conferred upon a person in circumstances in which retention by him of that benefit without paying its reasonable value would be unjust." *Erslon v. Vee-Jay Cement Contracting Co.*, 728 S.W.2d 711, 713 (Mo. App. 1987). An essential element of this tort is "a benefit conferred upon the defendant by the plaintiff." *Id.* Again, ACLU fails to establish the required element, for as previously discussed, it had no right to the fees and thus conferred no benefit on Miller. The court awarded the attorneys' fees on behalf of D.C., the plaintiff in the

civil rights action, thus it cannot be said that Miller received the money at the expense of ACLU. In this connection we point out that D.C. is not a party to this action and we insinuate nothing as to his rights to the proceeds.[4]

The trial court erred in granting summary judgment in plaintiffs' favor on each of the three counts. Miller was entitled to summary judgment as a matter of law on all counts, hence the judgment is reversed and the cause remanded for further proceedings consistent with this opinion. Miller's request for an award of costs is denied.

/s/ ALBERT L. RENDLEN, JUDGE

Higgins, Covington, Billings,
and Holstein, JJ., concur;
Robertson, J., dissents;
Blackmar, C.J., dissents in
separate opinion filed.

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[4]The parties attempt to make an issue of whether the fees were awarded to D.C. or to Miller. Although the order of the federal district court expressly awarded the fee to D.C., as is required by federal statute, it is manifestly clear that the award is intended to compensate the attorney representing him, and the City of St. Louis issued the check to Miller according to its standard procedure in such matters.

SUPREME COURT OF MISSOURI
en banc

No. 72837

AMERICAN CIVIL LIBERTIES UNION/
a not-for-profit corporation, and
LARRY KATZENSTEIN and JOYCE
ARMSTRONG, as representatives of
the AMERICAN CIVIL LIBERTIES UNION,
EASTERN MISSOURI, an unincorporated
association,
Plaintiffs-Respondents,

vs.

B. STEPHEN MILLER, III,
Defendant-Appellant.

DISSENTING OPINION

The principal opinion condones the conduct of a lawyer in taking unto himself monies which he had agreed he would pay over to his employer. It frustrates the policy of federal statutes providing for the award of attorneys' fees so as to make it possible for impecunious litigants to maintain statutory actions for the vindication of their civil rights. It does this by means of an unwarranted construction of state statutes and court rules designed to keep laypeople from making a profit from the law business and not at all to prevent nonprofit agencies which sponsor litigation in which they have no economic interest from recouping their actual outlays for salaries paid to their attorneys, in the rare cases in which fees are awarded. If our statutes and rules preclude the arrangement the defendant attorney bound himself to, they are at war with the express policy of the federal statutes providing for the recovery of attorneys' fees under the

civil rights statutes,[1] and therefore must give way under the supremacy clause.

1. *The Defendant's Employment*

The plaintiff American Civil Liberties Union, Eastern Missouri (ACLU/EM), is a not-for-profit membership association. Its purposes include "nurturing civil liberties and promoting or opposing legislation affecting civil liberties."[2]

ACLU/EM fosters and finances litigation in pursuit of its civil liberties objectives, as it conceives them. Cases are often filed on behalf of individual clients under statutes passed pursuant to the enabling provisions of the Fourteenth Amendment. These statutes provide remedies to implement the rights guaranteed by that amendment, thereby making use of our honored adversary process in the pursuit of constitutional and statutory rights. It makes no difference that some might deem this goal unworthy, the underlying statutes unwise, or the aims of a particular lawsuit trifling or pestiferous. Those who think they have rights are entitled to their day in court. Those in opposition may be heard in the same forum. That is the way our legal system works.

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[1] *The Civil Rights Act of 1870*, 42 U.S.C. § 1891, *The Civil Rights Act of 1871*, 42 U.S.C. § 1983, *Act of July 31, 1861*, 42 U.S.C. § 1985, *Act of April 20, 1871*, 42 U.S.C. § 1986, *The Civil Rights Act of 1964*, 42 U.S.C. § 2000d, 20 U.S.C.S. § 1681. *See also, Marek v. Chesney*, 473 U.S. 1, 43-51 (1985) (appendix to Brennan, J., dissenting).

[2] The plaintiff American Civil Liberties Union/Eastern Missouri Fund (ACLU Fund) is a Missouri not-for-profit corporation whose purposes include the "nurturing of civil liberties." It apparently exists as a fund raising medium with the monies raised being used to finance litigation sponsored by ACLU/EM. The present litigation was commenced by ACLU Fund, but ACLU/EM was made a party at the instance of the defendant. There is no dispute between the named plaintiffs, and we may treat their interests as identical.

Prior to 1982 ACLU/EM had no full time lawyer on its payroll. In that year the defendant, a recent graduate of a leading law school, was hired as its first full-time staff counsel at a salary comparable to the prevailing rate for new lawyers in the St. Louis area. He understood from the beginning of his employment that he was not to receive fees from litigants in the cases that he handled in litigation sponsored by his employer and that any court awards of attorneys' fees on account of his services were to be paid over to ACLU/EM. He continued in this employment until 1985.

2. *The Litigation Giving Rise to the Fee Award*

In 1984 ACLU/EM undertook the sponsorship of an action on behalf of one D.C. against the City of St. Louis and other defendants in the United States District Court for the Eastern District of Missouri. Jurisdiction was invoked under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. § 1983. The suit challenged the city's "masquerading" ordinance, punishing a person who appeared in public "in a dress not belonging to his or her sex . . . ."

The plaintiff signed a "retainer agreement" in which he stated that he sought the services of ACLU/EM in the pursuit of his legal objectives. The provisions of the agreement are important in showing the nature of ACLU/EM's involvement, the client's understanding, and compliance with appropriate rules governing legal ethics, and so I quote pertinent provisions as follows:

* * *

> I understand that I am represented by the lawyer named above, although the ACLU/EM is sponsoring my case.
>
> * * *
>
> The services of the lawyer will be provided to me free of charge.

> If my case is successful, the court may require the opponents to pay attorneys' fees and costs. I agree that any such award of fees or costs shall be paid in full to the ACLU/EM immediately upon my receipt of such award. ACLU/EM and I agree that I will retain any damages awarded to me after ACLU/EM is reimbursed for any costs not awarded to it by the court.
>
> * * *
>
> I also understand that I am free at any time to discharge the lawyer representing me (subject to court approval). However, if I choose to discharge my lawyer, the ACLU/EM is under no obligation to find a replacement or to continue its sponsorship of my case. Continued ACLU involvement in my case will be determined after consideration of all the circumstances that may exist at the time.

The agreement listed the lawyer selected by ACLU/EM as "Ms. Arlene Zarembka," an attorney in private practice in St. Louis. The defendant was later instructed by his employer to participate in the suit along with Ms. Zarembka. He signed the pleadings along with Zarembka, styling himself "Staff Counsel, ACLU/EM."

The litigation resulted in a judgment declaring the ordinance invalid. There was no monetary award. The defendant and Zarembka then prepared an application for attorneys' fees as authorized by 42 U.S.C. § 1988,[3] setting out the hours involved in detail. Before the application was ruled on, however, the defendant had resigned his employment with ACLU/EM in order to accept a judicial clerkship. He withdrew as counsel for

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[3] Standards developed for § 1988 awards "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " *Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7 (1983).

the federal plaintiff and the fee application was pursued by Zarembka. The court sustained the application for an amount substantially less than the request. Its order stated that "plaintiff is awarded $15,501.25 in attorneys' fees and $2,729.79 in reasonable costs." In an accompanying memorandum the court stated that $7411. was awarded for Zarembka's services and $8,090.25 for the defendant's.

The defendant then prevailed upon the City Counselor's office to procure a check payable to him for the portion of the award computed on the basis of his services. He did this without advising or seeking the assent either of his client or of his former employer.

3. *The Defendant's Dishonorable Conduct*

The defendant was quite willing to accept his regular pay-check from ACLU/EM for three years. He clearly understood that he was not to derive individual remuneration from the clients furnished him by his employer. This is a perfectly lawful arrangement, similar to the understanding that associates in law firms and lawyers employed by corporations often have. It was clear that his employer had no purpose of supplying clients to the defendant so that he could augment his salary.

The defendant worked on several cases in which fees were awarded for his services. In some of these he himself turned the fee awards over to his employer; in at least one other the award, part of which was based on the defendant's services, was turned over by his co-counsel without apparent protest by him. No doubt his employment would have been terminated had he undertaken to avail himself of the proceeds of fee awards while continuing on the payroll.

By the time the fee award in the D.C. case was decreed the defendant had resigned his employment, and so had no worries

about being fired.[4] The award was in favor of the plaintiff in the federal case. The governing statute provides that fees may be recovered by the "prevailing party." Nothing in the judgment authorized the defendant to help himself to any part of the proceeds of the fee. He knew that his client had bound himself to pay over any fee award to ACLU/EM.[5] He necessarily knew of his own contractual obligation. He admits that he did not tell either his client or his employer what he had done. This conduct speaks for itself.

The defendant now protests that he was afraid he might be subject to disciplinary action if he were to turn the proceeds over to his employer, as he had bound himself to do. He could have solved his professed dilemma easily by bringing an action of interpleader pursuant to our rule 52.07. This is the much preferred course for one who comes into possession of funds that others may claim. The defendant did not have to help himself to the money in order to secure a determination of the governing legal considerations. He seems to operate under the maxim that possession is nine points of law.

4. *Federal Statutory Policy*

42 USC § 1988 provides that, in actions under certain civil rights statutes including 42 U.S.C. § 1983, under which the federal suit was brought

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[4] I cannot understand the statement in the principal opinion that ACLU/EM did not "confer a benefit" on the defendant. It put him in a position in which he was able to abstract the fee, and so he was unjustly enriched.

[5] There is absolutely no reason why the client could not honor this commitment, given the opportunity.

> the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the costs.

This statute has the purpose of assisting persons who have claim of violation of constitutional rights to advance their claims through litigation. Congress was aware that people often lack the means for obtaining legal assistance to vindicate their rights in court, and it responded by permitting fee awards to successful litigants. The fee award statute represents a national policy which we should respect.[6]

One of the purposes of ACLU/EM is to sponsor statutory actions to establish civil rights.[7] By providing the services of a

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[6] "Congress endorsed . . . decisions allowing fees to public interest groups when it was considering and passed [section 1988]." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70 n. 9 (1980).

The principal purpose of § 1988 was to increase the availability of lawyers taking civil rights cases, to ensure "effective access to the judicial process." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 3, 8 n. 16 (1976).

[7] *See also Palmigiano v. Garrahy*, 616 F.2d 598 (1st Cir.) (National Prison Project) *cert. denied* 449 U.S. 839 (1980); *Mary & Crystal v. Ramsden*, 635 F.2d 590 (7th Cir. 1980) (Youth Policy and Law Center); Encyclopedia of Associations (22d ed. 1988).

Public interest organizations purport varied purposes. *See Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (adopting the position of the Pacific Legal Foundation, upholding the government's exemption shielding coal reserve developers from environmental impact statements); *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981) (the Mountain States Legal Foundation was successful in precluding the Sierra Club from interfering with established water rights); *Edwards v. Carter*, 445 F.Supp. 1279, *affirmed* 580 F.2d 1055, *cert. denied* 435 U.S. 1005 (1978) (the Washington Legal Foundation attempted to stop President Carter from terminating a treaty without congressional participation). *See* O'Connor and Epstein, *Rebalancing the Scales of Justice: Assessment of Public Interest Law*, 7 Harv. J.L. & Pub. Pol'y 483 (1984).

salaried staff attorney, ACLU/EM may make it possible for agreeable but impecunious litigants to commence suit without a monetary advance. This arrangement serves the policy of the underlying federal statutes and is perfectly consistent with every ethical standard of the legal profession.

42 U.S.C. § 1988 provides that fee awards are to be made to "the prevailing party." It is manifest, however, that the purpose of the award is to permit the prevailing party to fulfill express or implied obligations for legal services. Courts construing this section have never hesitated to make awards in favor of organizations such as ACLU/EM, which sponsor litigation for the enforcement of constitutional rights.[8] Cases are legion in which awards have been made for the services of salaried attorneys when all concerned clearly understand that the award will be paid over to the employer. I have seen no case in which the court awarding the fees has suggested that there is the least impropriety in so doing. However the decree awarding fees is phrased,

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[8] *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 945 (1989) ("That a nonprofit legal services organization may contractually have agreed not to charge *any* fee of a civil rights plaintiff does not preclude the award of a reasonable fee to a prevailing party in a § 1983 action, calculated in the usual way."); *McKenzie v. Kennickell*, 875 F.2d 330, 333-34, *reh. denied*, en banc, 884 F.2d 1405 (D.C. Cir. 1989) (Distinguishing between private counsel and nonprofit organizations would "subvert the congressional intent that fee shifting statutes should benefit nonprofits."); *Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983) ("Section 1988 contemplates that both public interest lawyers and private law firms be provided with incentive to prosecute civil rights actions; the fee awards provide this incentive by increasing the ability and willingness of both groups to finance litigation they would otherwise be unable or unwilling to afford."); *Palmigiano v. Garrahy*, 616 F.2d 598, 601-02 (1st Cir. 1980) (awarding fees to the National Prison Project) *citing Reynolds v. Coomey*, 567 F.2d 1166-67 (1st Cir. 1978) (awarding fees to the NAACP Legal Defense Fund); *Oldham v. Ehrlich*, 617 F.2d 163, 168-9 (8th Cir. 1980); *New York State Ass'n For Retarded Child., Inc. v. Carey*, 711 F.2d 1136, 1154 (2nd Cir. 1983).

ACLU/EM is an eligible recipient for a fee award under the federal statute. There is absolutely no support in the cases for the statement in the principal opinion that the statue was intended to "compensate the attorney representing him" without regard to the attorney's contractual obligations.

ACLU/EM's connection with the federal case was manifest in the pleadings. I am sure that the court awarding the fees fully expected that the portion awarded on account of the defendant's services would be paid over to his employer, and considered that such payments would be consistent both with the governing laws and with established ethical standards. Such an understanding would accord with the uniform course of decision. I am confident that the federal judge would be as shocked as I am at the defendant's having converted the proceeds to his own use. He necessarily assumed that all involved would comply with their contractual obligations, and that he did not have to police the distribution of the proceeds.

5. *Our Statutes and Rules*

Section 484.160, RSMo 1986, was adopted in 1915.[9] It was clearly designed to apply to fees earned in the ordinary course of the private practice of the law and to support the salutary principle, found in almost all codes of professional conduct, that a person who is not a lawyer cannot appropriately share in the profits of the practice of law. It also gives some assurance that law business will go to the lawyer with the best reputation instead of to the one with the fastest runners. The statute, indeed, did not establish new standards of professional conduct. It rather provided a criminal sanction for violation of long-recognized professional standards. The few cases construing the statute make its purpose clear. *State ex rel. McKittrick v. C.S. Dudley*

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[9] *See also Canons of Professional Ethics*, Canon 34 (1928).

and Co., 340 Mo. 852, 102 S.W.2d 895, *cert. denied*, 302 U.S. 693 (1937), dealt with a corporation engaged in bill collection which referred claims to lawyers when it was unable to effect collection. We held that a lawyer retained by the agency could not pay over to it a portion of the fee charged for obtaining and collecting judgments.

The statute should be construed in the setting in which it was adopted and in the light of its purpose. Because it is a criminal statute the role of strict construction should apply. Its obvious purpose is to restrict earnings from the practice of law to licensed lawyers. The words, "fees and other compensation received by him in the practice of law," necessarily refer only to sums received by a lawyer under an express or implied contract for compensation, and to awards of fees directly to a lawyer, as is usual in probate matters and some others.

In this case the fees ordered by the federal court were not awarded to the lawyer, nor was it contemplated by the court that the defendant would receive them personally. They were awarded to the federal plaintiff to enable him to discharge his legal obligations which, in this case, included the obligation to pay the award to ACLU/EM. The defendant got possession of the money only by self-help. He would not violate the statute by suffering the payment of the award fees in the manner that both he and the client had agreed to.

This case differs substantially from any other case our courts have dealt with. ACLU/EM paid the defendant a salary and underwrote the additional expenses which are necessary in the practice of law. The record shows that the fees awarded for the defendant's services during the course of his employment are far less than the salary paid him. There is no indication whatsoever that the association derived a profit from the lawyer's services.[10]

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[10] Those of us with experience in private practice know that the expenses of attorneys invariably consume one-third to one-half of the gross.

The record also shows that, throughout the period of the plaintiff's employment, he was his employer's first and only salaried staff counsel. Nothing in the statute or the canons of ethics would preclude reimbursement for salary and expenses of an employed lawyer.

The principal opinion, lacking any supporting judicial authority whatsoever, refers to opinions of the Advisory Committee of the Missouri Bar. Our Rule 5.06 authorizes the Advisory Committee to promulgate formal opinions, which are required to be published in the Journal of the Missouri Bar. Under the reasoning of *Gershman Invest. Corp. v. Danforth*, 517 S.W.2d 33 (Mo. Banc 1974),[11] these opinions are simply opinions, entitled to no more weight as authority than the opinion of any other competent lawyer. That particular "opinion" which the defendant and the principal opinion adduce was not even promulgated in accordance with the requirements of Rule 5.06. It is simply a letter from the General Chairman expressing his views. His conclusion is tentative, as he professes willingness to examine pertinent federal authorities. Myriad federal authorities conflict with his informal opinion.

Thus the "firm policy of our state" which the principal opinion perceives vanishes into thin air. It is simply an invention of the writer utterly unsupported by authority. Nor is any reason given for the conclusion, other than the principal opinion's warped constructed of the statute. There is no policy of our law which requires a judgment in favor of the defendant in this case. The principal opinion meekly concedes that "some states have reached a contrary determination." The fact is that not a single decision from any state supports the result reached by the majority.

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[11] This case, dealing with opinions of the Attorney General issued pursuant to § 362.195, RSMo 1986, dealt with an opinion prepared by the present writer.

The absence of authority elsewhere is significant. The principles of legal ethics are substantially the same in all American jurisdictions and, indeed, in all common law jurisdictions. The statute relied on in the principal opinion was passed to effectuate the prevailing standards. Many of the opinions supporting recovery of fees by organizations similar to ACLU/EM were written or participated in by judges of outstanding reputation, who were perfectly familiar with prevailing standards of legal ethics. Claims of unethical conduct and "fee splitting" were made in these cases with recurring monotony, and emphatically rejected. It would be the height of arrogance for our Court to suggest that it is more sensitive to ethical considerations than our judicial contemporaries might be.

The practice of awardings fees to sponsoring organizations simply did not exist when § 484.160 was enacted. It is not literally applicable to the present situation and its application is not necessary to serve any underlying policy. Because of the problems under the supremacy clause, the Court should reach a construction which is not subversive of the policy of the federal law.

6. *Conflict with Federal Policy?*

The principal opinion then takes up the respondents' argument relating to the federal constitutional and statutory policies implicit in 42 U.S.C. § 1988. Just as defendant's counsel does, it trumpets the statement in an article by the plaintiffs' trial counsel, Simon, *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L.J. 1069 (1989) that "the Supreme Court has never expressly extended First Amendment protection to fee-sharing arrangements with nonprofit groups." I should think that our purpose would be to determine what is right and proper under the laws of the United States and of our state, and not to move only when we are prodded from above. Be that as it may, the fair intendment of *NAACP v. Button*, 371 U.S. 415 (1963) and

In re Primus, 436 U.S. 412 (1978) clearly supports the plaintiff's position. The conclusion of the principal opinion impedes the policy underlying 42 U.S.C. § 1988. The Supreme Court of the United States has regularly struck down state statutes or rules governing the legal profession when they conflict with federal law.[12] We should construe our statutes and rules in a manner consistent with the federal constitution and statutes.[13] Otherwise we transgress the supremacy clause.

NAACP v. Button, 371 U.S. 415 (1963), recognized, perhaps to the surprise of many in the private bar, that litigation of issues within the ambit of the bill of rights and the equal protection clause is a form of political expression and association which is entitled to First Amendment protection against infringing state action. The National Association for the Advancement of Colored People engaged in the kinds of activities one might gather from its name. It maintained a staff of salaried attorneys who prosecuted suits on behalf of those who claimed to be victims of racial discrimination. Its representatives sought to get in touch with potential victims of discrimination to determine their possible availability as plaintiffs. The state court held that this conduct violated ethical rules against solicitation of lawsuits. The Supreme Court said that the state could not impose these

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[12] *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971) (labor union may recommend specific attorneys to its members and limit their fees); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (labor union has First Amendment right to hire attorneys to serve its members in their individual cases), *Brotherhood of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, *reh. denied* 377 U.S. 960 (1964) (labor union has right to recommend specific attorneys to its injured members).

[13] As has been shown previously, it is not necessary to declare either § 484.150.1, former DR 3-102, or current Rule 5.4 unconstitutional, to reach a holding consistent with federal law. It is sufficient to hold that they do not apply, for the reasons outlined in the preceding section.

rules as a barrier to the pursuit of antidiscrimination actions. The Court observed that the state rules were designed to protect the public against predatory lawyers acting for their own economic benefit, and that their application to the activities of NAACP was not necessary to serve any proper state purpose.

In later cases (cited in footnote 13) the Court has made it clear that rules of professional conduct inhibiting behavior variously described as champerty, maintenance, or barratry could not be applied beyond their legitimate purpose so as to impede First Amendment right. The most recent case is *In re Primus*, 436 U.S. 412 (1978), in which state sought to discipline an attorney who wrote to a litigant who had been sterilized in a possibly unconstitutional manner, advising her of the availability of a public interest organization to assist her in the pursuit of her constitutional claim. The attorney did not stand to recover a fee in the action. The Court stressed the absence of economic motivation on the part of the lawyer and the organization, and held that the solicitation represented protected speech which had been infringed by the inhibitory state regulation. It distinguished *Ohrilak v. Ohio State Bar Ass'n*, 436 U.S. 447, *reh. denied*, 439 U.S. 883 (1978), decided the same day, which held that the state could discipline lawyers who personally solicited accident victims in hospital beds.

There is no principle that fee awards under the statute must go to the attorney who renders the services, when the attorney is hired for the purpose of maintaining civil rights lawsuits and paid a regular salary.[14] The principal opinion enunciates no state interest, compelling or otherwise, which justifies our Court in setting itself in opposition to the policy and principle of the

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[14] *Howard v. Phelps*, 443 F. Supp. 374, 377 (E.D. La. 1978) ("... it is plain that the ... American Civil Liberties Union should receive the fees generated by [the lawyer's] services up to the date he was no longer employed by them. ...").

federal statutes. There is no doubt that our action makes organizations, of whatever hue of the political spectrum, which sponsor civil rights litigation less able to serve their constituencies than are like organizations in other states. Sections 1983 and 1988, therefore, operate less effectively in Missouri than in other states. This situation is at war with the supremacy clause.

Under *Button* and *Primus* those who are interested in the cause of men who want to appear on the streets of Clayton in women's clothes have the first amendment right to advocate their position by litigation, and to solicit potential plaintiffs to this end. The first amendment is applicable to the states because it is incorporated into the fourteenth. *Near v. Minnesota*, 283 U.S. 697 (1931). 42 U.S.C. §§ 1983 and 1988, the latter providing for attorneys fees, are statutes passed to implement the fourteenth amendment, under the express authority of section 5 of that article, and therefore to implement the first amendment rights recognized by *Button* and *Primus*. A state statute or policy which interferes with the operation of federal statutes implementing the fourteenth amendment must necessarily fall under the supremacy clause of Article VI.

My conclusion is consistent with the recent opinion of Judge Scott O. Wright of the United States District Court for the Western District of Missouri, in which he finds a violation of the supremacy clause in the attempt of the state of Missouri to recoup the cost of incarceration out of awards of punitive damages to prisoners under 42 U.S.C. 1983. *Hankins v. Finnel*, No. 88-4094, slip op. at 8, 11-12 (W.D. Mo. Jan. 28, 1991). The judge holds that the state action thwarts the policy of the federal statute, which has as its purpose the discouragement of violations by prison employees. *Id.*

Here the interference is patent. If the plaintiffs are entitled to recover the fees awarded for the services of their staff attorneys, they may be able to continue and expand the hiring of staff

attorneys, so as better to serve the litigants Congress wants to encourage them to assist.

It might help to consider the economics of the arrangement in more detail. Fees under § 1988 are manifestly contingent, available only to a "prevailing party."[15] They differ from the usual contingent fee arrangements which are usual in personal injury litigation in that they must be based on hourly computations and prevailing hourly rates rather than on a percentage of recovery. Many civil rights cases, such as this one, cannot be valued monetarily. So it is much more difficult for the civil rights lawyer than for the personal injury lawyer to make up for losses by wins. For this reason, a civil rights action may be less attractive than a damage suit to a private practitioner.[16] Some will decline contingent actions of this kind and others may be forced to limit their intake. An organization which provides a salaried lawyer, therefore, serves a salutary purpose. This Court's decision, then, makes it more difficult for civil rights claimants to get the legal representation the federal statues[sic] seek to assist them in getting. This is the necessary effect, and therefore the intent, of the principal opinion.

If the defendant's position is upheld his employer could only operate as a procurement agency for his law practice, subsidizing unsuccessful actions without being able to recoup in successful ones. It is neither necessary nor desirable to place it in such a position. The arrangement under which the defendant was hired is perfectly legitimate.

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[15] *See, e.g., Texas State Teachers Ass'n. v. Garland Indep. School Dist.*, 489 U.S. 782, 109 S.Ct. 1486, 1489 (1989); *Fast v. School Dist. of City of Ladue*, 728 F.2d 1030 (8th Cir. 1984).

[16] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968). *See also* footnote 8, *supra*.

The defendant suggests that ACLU/EM is not eligible for a fee award because its governing board includes non-lawyers. Dozens of cases sanction fee awards to similar organizations.[17] There is no obstacle to awarding fees to organizations such as the plaintiff based on prevailing market rates. Nor is there any authority for reducing the portion of the fee award the plaintiffs can recover because of the nature of ACLU/EM. In *Blum v. Stenson*, 465 U.S. 886, 894 (1983),[18] the Court stated:

> It is also clear from legislative history that Congress did not intend the calculation of fee awards to vary depending on

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[17] *Love v. Mayor, City of Cheyenne, Wyo.*, 620 F.2d 235, 237 (10th Cir. 1980) ("It is well settled that the ACLU is entitled to an award of attorney's fees under § 1988"); *McLean v. Arkansas Bd. of Educ.*, 723 F.2d 45, 48-49 (8th Cir. 1983) ("Fee awards ultimately benefiting legal services organizations, over and above their general or specific fund-raising efforts, help to insure the continued existence of such organizations and their ability to represent other indigent parties who cannot afford private legal representation."); *Rodriguez v. Taylor*, 569 F.2d 1231, 1245 (3rd Cir. 1977) *cert. denied*, 436 U.S. 913 (1978) ("The award of fees to legal aid offices and other groups furnishing *pro bono publico* representation promotes the enforcement of the underlying statutes as much as an award to privately retained counsel. Legal services organizations often must ration their limited resources. Allowing them to recover fees enhances their capabilities to assist in the enforcement of congressionally favored individual rights."); *Lund v. Affleck*, 587 F.2d 75, 76 (1st Cir. 1978) (legal services organizations may recover fees under § 1988).

[18] The Legal Aid Society of New York, whose governing board includes non-lawyers, represented the plaintiff in this case.

whether plaintiff was represented by private counsel or by a nonprofit legal services organization.[19]

The retainer agreement makes it clear that the lawyer represents only the client, and thus the client is free to discharge the lawyer at any time. The defendant surely does not suggest that his management of this case was the subject of improper outside interference. Nor is there any indication that any case sponsored by the plaintiffs was handled other than in accordance with the highest professional standards. If problems arise in future cases the disciplinary arm should be adequate.

7. *Summary Judgment for Defendant*

Even if the Court is of the opinion that summary judgment for the plaintiff was improvident, the summary judgment for the defendant violates established procedural standards. The Court sums up its rationale in a footnote (No. 1) which is noteworthy in that it contains more misstatements of established procedural law than I have ever seen in such a confined space. I particularize.

The fundamental error, perhaps, is highlighted in the statements about what the plaintiff "chose to plead and try." There of course was no trial.

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[19]This holding refutes the defendant's use of *National Treasury Emp. Union v. United States*, 656 F.2d 848 (D.C. Cir. 1981), which the defendant makes much. It is hard to see how this case helps him, because it clearly sanctioned reimbursement to the attorneys' employer. The organization involved, furthermore, existed for the economic benefit of its members. The rule of that case has never been applied to an organization such as the plaintiff. Moreover, the D.C. Circuit in *McKenzie v. Kennickell*, 875 F.2d 330, 333-34, *reh. denied*, en banc, 884 F.2d 1405 (D.C. Circuit 1989), held that distinguishing between private counsel and nonprofit organizations would "subvert the congressional intent that fee shifting statutes should benefit nonprofits."

Next, the summary judgment for the defendant is jurisdictionally flawed under the ten-day provision of Rule 74.04(c). The defendant's opposing affidavit, filed on the day of the hearing, could properly be received in opposition to the plaintiffs' motion, but it cannot support the motion of the defendant. The ten-day provision is mandatory. *Joachim Sav. & Loan Ass'n v. State Farm Fire and Cas. Co.*, 764 S.W.2d 648, 650 (Mo. App. 1988).

The reason for the ten-day provision is that the trial court has great discretion in the processing of summary judgment. The trial court is not obliged to accept the statements in affidavits, even though they are not explicitly controverted. Affidavits and other materials presented on behalf of the moving party are strictly construed. Rule 74.04(e) provides that the trial court may "permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." The trial court had no occasion to tender the plaintiffs this opportunity, insofar as the defendant's motion is concerned, because it was of the opinion that the plaintiffs were the parties entitled to summary judgment. *See Noll v. Shelter Ins. Co.*, 774 S.W.2d 147, 149 (Mo. banc 1989), holding that the prevailing party need not respond to points which need be reached only if there is a reversal. Simply because the Court feels that the plaintiff is not entitled to summary judgment, it does not follow that the defendant is so entitled.[20]

It is also stated that "ACLU made no claim in its petition for return of any portion of the salary paid defendant." The essence of the plaintiffs' claim was that the defendant violated his contract of employment by receiving additional compensation for legal services performed as part of his employment. The

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[20] *St. Charles County v. Dardenne Realty Co.*, 771 S.W.2d 828, 830 (Mo. banc 1989); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 244 (Mo. banc 1984).

plaintiffs are entitled to explore any aspect of that fact situation, and to amend to reach this result. *Wells v. Stinson, Mag & Fizzell*, 739 S.W.2d 706 (Mo. banc 1987); *Grandview Bank & Trust Co. v. Stinson, Mag & Fizzell*, 739 S.W.2d 707 (Mo. banc 1987). They should not be cast on summary judgment without being given the opportunity to amend their pleading to state a claim for recovery of salary, if that might be a viable claim.[21] The action should not be dismissed short of the trial stage if the pleadings state facts which might support recovery on any reasonable theory.[22]

At a later point the Court says, "we point out that D.C. is not a party to this action and we insinuate nothing as to his rights to the proceeds." The plaintiffs had an assignment from D.C., which gave them colorable authority to claim what he might be entitled to. The defendant made no point in the trial court of the absence of D.C. as a party, although he did object that ACLU/EM was not a party at the inception and that organization was later included as a party. If it is necessary to make D.C. a party, the plaintiffs should have the opportunity to do so.[23] It violates established procedural norms to put them out of court on summary judgment without giving them this opportunity..

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[21] *Offenbacker v. Sodowsky*, 499 S.W.2d 421, 427 (Mo. 1973); *Jensen v. Estate of McCall*, 426 S.W.2d 52, 56 (Mo. 1968); *Dietrich v. The Pulitzer Pub. Co.*, 422 S.W.2d 330, 334 (Mo. 1968); *Boyd v. Kansas City Area Transp. Authority*, 610 S.W.2d 414, 416-17 (Mo. App. 1980); *Koller v. Ranger Ins. Co.*, 569 S.W.2d 372, 373 (Mo. App. 1978).

[22] *See Frame v. Boatmen's Bank of Concord Village*, 782 S.W.2d 117 (Mo. App. 1989).

[23] *Rule* 52.06; *Rule* 52.04; *Daiprai v. Moberly Fuel & Transfer Co.*, 359 Mo. 789, 223 S.W.2d 474 (Mo. 1949); *Kiefer v. First Capitol Sports Center, Inc.*, 684 S.W.2d 483, 488 (Mo. App. 1984); *Humphrey v. Humphrey*, 639 S.W.2d 269, 270 (Mo. App. 1982)

The vice of the principal opinion with respect to the motion for summary judgment is highlighted by two particular passages, in which the defendant's late affidavit is apparently accepted uncritically. It states that the payment to the attorney was made according to the city's "standard procedure in such matters." The opinion simply lifts the bare language of the defendant's affidavit. Furthermore, I am unable to see what legal significance the city's "standard procedure" has. There is no explanation as to how the plaintiff can draw down the award personally when he was not entitled to it by the terms of the judgment, or how he could draw it down as an attorney when he was no longer an attorney in the case.

It is also said that "defendant offered to refund a proportional share of the salary." The only basis for his statement is an affidavit filed on the date of the hearing, stating the bare allegations that the opinion parrots. Nothing in the papers shows what amount was tendered, or the basis for computation. If this allegation has any significance, it is not sufficiently established by the affidavit. If the tender was made as an offer in compromise, then it is clearly not admissible against either the offeror or the offeree, under established legal standards.[24] If the point is that the defendant has tendered all that the plaintiffs are claiming, then why are the plaintiffs not entitled to some recovery based on a portion of the salary paid the defendant? If they are entitled to anything, then the Court improvidently entered summary judgment for the defendant.

Footnote 1 concludes by saying that "the decision does not determine the so-called 'ethical conduct' of the defendant to which the dissent alludes." The defendant's conduct stands out on the face of the record. The principal opinion, by directing

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[24] *Jacobs v. Danciger*, 344 Mo. 1042, 130 S.W.2d 588, 592 (1939); *Kelsey v. Kelsey*, 329 S.W.2d 272, 274 (Mo. App. 1959).

summary judgment for the defendant, necessarily places its stamp of approval on the defendant's conduct, and holds that the plaintiff is without remedy on account of this conduct. Why this deliberate closing of the eyes? *Cf. Sprung v. Negwer Materials, Inc.*, 775 S.W.2d 97 (Mo. banc 1989); *Sprung v. Negwer Materials, Inc.*, 727 S.W.2d 883 (Mo. banc 1987).

The summary judgment for the defendant violates established procedural norms. It will rise to haunt us in years to come, in sundry cases. Even if the Court concludes that the summary judgment for the plaintiff is infirm, the case should be remanded for further proceedings. A plaintiff who is successful in the trial court should not be summarily turned out on appeal without being provided the opportunity to explore alternatives on remand. *Moss v. National Super Markets, Inc.*, 781 S.W.2d 784, 786 (Mo. banc 1989).

Conclusion

I would affirm the judgment. Even if the majority is not so disposed, the proper course is to reverse and remand for further proceedings.

/s/ Charles B. Blackmar, Chief Justice

IN THE MISSOURI COURT OF APPEALS
EASTERN DIVISION
DIVISION THREE
No. 57109

AMERICAN CIVIL LIBERTIES UNION/EASTERN MISSOURI FUND, a not-for-profit corporation, and LARRY KATZENSTEIN, and JOYCE ARMSTRONG, as representatives of the AMERICAN CIVIL LIBERTIES UNION, EASTERN MISSOURI, an unincorporated association,

Plaintiffs/Respondents,

vs.

B. STEPHEN MILLER, III,

Defendant/Appellant.

Appeal from the Circuit Court of St. Louis County
Hon. Bernhardt C. Drumm, Jr.
Opinion filed: May 1, 1990

Defendant B. Stephen Miller, III, appeals from the trial court's order denying his summary judgment motion and granting plaintiffs' summary judgment motion. We reverse and remand.

Miller raises several points of error. Miller, an attorney, contends that Missouri's "fee-sharing" statute and Rules of Professional Conduct prevent American Civil Liberties Union/ Eastern Missouri and its Fund from forcing him to turn over attorney fees to them. Further, he contends that neither conversion or unjust enrichment are applicable.

I. Background

We derive the background information from depositions, pleadings, motions, and affidavits present in the record. Miller was hired as ACLU/EM's first staff counsel in 1982. ACLU/EM paid him a monthly salary as a full-time employee. He understood that "any attorneys' fees that [he] received would be handed over to the organization."

Miller was staff counsel for ACLU/EM from 1982 until 1985. Between 1984 and 1985, ACLU/EM sponsored civil rights litigation which challenged a City of St. Louis ordinance. That case, *D.C. and M.S. v. City of St. Louis*, No. 84-1152 C(3) (E.D. Mo.) was tried in federal court. Miller, as ACLU/EM staff counsel, and Arlene Zarembka, an ACLU/EM "cooperating" or "Volunteer" attorney, were co-counsel for D.C. and M.S.

ACLU/EM's agreement with D.C. required ACLU/EM to provide legal services free of charge. In exchange, D.C. promised that any court "award of fees or costs shall be paid in full to the ACLU/EM immediately upon my receipt of such award."

D.C.'s challenge to the ordinance was successful. Thereafter, in June, 1985, Miller and Zarembka filed a "Motion for Attorneys' Fees and Costs" on behalf of D.C. pursuant to 42 U.S.C. § 1988. That motion asked the district court to award D.C. (1) $35,765.00 for attorney fees based on services rendered by Miller and Zarembka and (2) $2,729.72 for costs advanced by ACLU/EM.

On July 15, 1985, Miller resigned his position as ACLU/EM staff counsel, effective August 23, 1985. On September 25, 1985, the district court ordered D.C.'s motion "Granted so that [D.C.] is awarded $15,501.25 in reasonable attorneys' fees and $2,729.79 in reasonable costs." The district court's order included a memorandum which disclosed that the award was based on crediting Miller's work with $8,090.25 and Zarembka's with $7,411.00.

In early October, Miller contacted the City Counselor's office regarding the City's payment of attorney fees and costs pursuant to the district court's order. At Miller's request, the City issued a separate check solely to Miller for $8,090.25 and a separate check for $2,729.79 to the ACLU/EM for costs.

ACLU/EM demanded that Miller turn the $8,090.25 over to ACLU/EM. It asserted that Miller was contractually obligated to do so. Miller refused, asserting that such action would violate both the ethical prohibition against "fee-sharing" and § 484.150.1, RSMo 1986.

Plaintiffs filed this action against Miller to recover the $8,090.25. In three alternative counts, it pled: (1) contractual obligation; (2) conversion; and (3) unjust enrichment. The trial court sustained ACLU/EM's motion for summary judgment on all three counts and denied Miller's cross-motion for summary judgment.

II. Contractual Obligation

In his first point, Miller maintains that the trial court erred in "granting plaintiffs' motion for summary judgment and in denying the cross-motion for summary judgment filed by defendant, because the unassailable proof established that defendant was entitled to judgment as a matter of law in that . . . Missouri public policy, Missouri statutory law and the canons of professional responsibility . . . prohibited defendant . . . from sharing with plaintiffs . . . any fees he received in the practice of law or in doing law business."

Initially, we note that "it is no longer necessary to support a motion for summary judgment by 'unassailable proof.' " *Defino v. Civic Center Corp.*, 780 S.W.2d 665, 667 (Mo. App. E.D. 1989). Summary judgment "shall be entered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 74.04(c).

The parties agree that there is no genuine issue of material fact. Accordingly, our review is limited to determining whether, as between these two parties, Miller was entitled to a judgment as a matter of law. We point out that, although the federal court's award was to D.C., he is not a party to this action, and therefore his right to the $8,090.25 is not before us.

Count I of plaintiffs' second amended petition asserted that Miller "was a fully salaried employee of the ACLU/EM." Further, it asserted that he had a contractual obligation "to pay over to ACLU/EM all court awarded fees in litigation sponsored by the ACLU/EM so that the ACLU/EM could, in turn, pay those fees over to the [ACLU/EM Fund]."

That obligation allegedly arose from ACLU/EM's Policy X-20 titled "Court-Awarded Attorneys' Fees: Staff Attorney." It provides: "Staff attorneys are encouraged to apply for and receive court-awarded fees to be paid by opposing parties, but all such fee awards must immediately be paid over to the ACLU/EM."

Miller maintains that this "fee-sharing" arrangement is prohibited by § 484.150.1, RSMo 1986. That statute provides:

> It shall be unlawful for any licensed attorney in the state of Missouri to divide any fees or compensation received by him in the practice of law or in doing law business with any person not a licensed attorney *or any firm not wholly composed of licensed attorneys, or any association* or corporation, and any person, firm, association or corporation violating this section shall be deemed guilty of a misdemeanor and upon conviction therefore shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars and costs of prosecution, which

> fine shall be paid into the treasury of the state of Missouri. (emphasis added).

Further, Rule 5.4(a) of Rule 4 of Professional Conduct, provides, "A lawyer or law firm shall not share legal fees with a nonlawyer . . . ." While there are limited exceptions to that rule, none are applicable here.

Thus, § 484.150.1 and Rule 5.4 of Rule 4 prohibit Miller from sharing attorney fees with either ACLU/EM or the ACLU/EM fund. The fact that Miller may have had a contractual obligation to pay those fees over to ACLU/EM is irrelevant. An agreement to act in violation of a valid statute is void, *Bridges v. First Nat'l Bank*, 613 S.W.2d 716, 719 (Mo. App. E.D. 1981); and "[a] valid and enforceable contract may not arise out of a transaction prohibited by state law." *Faygal v. Shelter Ins. Co.*, 689 S.W.2d 724, 727 (Mo. App. E.D. 1985).

Plaintiffs maintain that § 484.150.1 as applied to ACLU/EM and its Fund is unconstitutional. Plaintiffs have not directed us to controlling precedent which supports this assertion[1]. We hold that the prohibition against dividing attorney fees with nonlawyers under § 484.150.1 is constitutional as applied to ACLU/EM and its Fund.

Accordingly, the trial court erred in entering summary judgment on Count I in favor of plaintiffs. Miller was entitled to summary judgment as a matter of law, and the trial court erroneously denied his cross-motion for summary judgment on Count I.

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[1] Plaintiffs urge us to apply the reasoning in *In Re Primus*, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978) and hold that our "fee-sharing statute" does not apply to organizations such as the ACLU/EM. We decline to do so.

III. Conversion and Unjust Enrichment

Miller's other points allege the trial court erred in sustaining plaintiffs' motion for summary judgment on Count II, conversion, and Count III, unjust enrichment. Miller also contends he was entitled to summary judgment as a matter of law on those counts.

A. Conversion

Contrary to the assertion in their summary judgment motion that attorney fees were awarded to Miller, plaintiffs state in their brief that the district court "awarded fees to [D.C.]." Miller, according to plaintiffs, "nevertheless, arranged to have the check issued directly to him" without conferring with D.C. and securing D.C.'s authorization to do so. Thus, plaintiffs argue, Miller "misappropriated money which had been awarded to his client. Because the client . . . had previously agreed to pay any court awarded fees over to ACLU/EM, ACLU/EM has a claim of right to the money which is superior to [Miller's]."

We need not resolve the parties' debate as to whether conversion is a proper action to recover money in Miller's possession. As previously noted, the $8090.25 check was made payable solely to Miller. Although plaintiffs assert that they have a "claim of right to the money which is superior to [Miller's]," plaintiffs do not assert that, at the time of the alleged conversion, they had possession of the check or money, or had such property right in the check or money "as drew to [them] the right of possession." *Major v. Berg*, 95 S.W.2d 861, 862-863 (Mo. App. E.D. 1936). Nor do plaintiffs assert ownership of the check or money which carries with it the right to immediate possession. *Brede Decorating, Inc. v. Jefferson Bank & Trust Co.*, 345 S.W.2d 156, 164 (Mo. Div. 2 1961).

Further, no ownership rights arise from D.C.'s agreement with ACLU/EM to pay over any attorney fees awarded and

received by D.C. We recognize that "[i]n Missouri, any language which shows an intent to clearly and unconditionally transfer a chose in action can operate as an assignment." *Eastern Atl. Transp. v. Dingman*, 727 S.W.2d 418, 421 (Mo. App. W.D. 1987). However, under the agreement in this case, D.C. merely promised to pay over to ACLU/EM any attorney fees or costs "immediately upon [D.C.'s] receipt of such award." Accordingly, that agreement is not an assignment of any cause of action D.C. may have against Miller to recover the fees awarded to D.C.

B. Unjust Enrichment

"Unjust enrichment occurs where a benefit is conferred upon a person in circumstances in which retention by him of that benefit without paying its reasonable value would be unjust." *Erslon v. Vee-Jay Cement Contracting Co.*, 728 S.W.2d 711, 713 (Mo. App. E.D. 1987). "The principle of unjust enrichment has given rise to the doctrine of quasi-contract, also known as a contract implied in law, as a theory of recovery." *Id.*

One of the essential elements of that theory of recovery is "a benefit conferred upon the defendant by the plaintiff." *Id.* With respect to the money Miller received from the City, however, plaintiffs cannot establish that essential element.

Plaintiffs argue on appeal that "[b]ecause the client had already agreed to pay the money over to . . . ACLU/EM as reimbursement for money [ACLU/EM and the Fund] expended to provide the client with legal representation, [Miller] received the benefit (money) at the expense of [ACLU/EM and the Fund]."

Plaintiff's argument fails, however, in light of our previous determination that the agreement between D.C. and ACLU/EM was not an assignment. The district court's order awarded attorney fees to D.C. Thus, it would appear that D.C. may have a cause of action against Miller with regard to the money Miller

obtained from the city. Plaintiffs, in turn, may have a cause of action against D.C. arising from the promise to pay contained in the agreement with ACLU/EM. Further, if D.C. seeks payment from the City for the amount awarded him by the district court, and the City is required to pay him, the City may also have a cause of action against Miller.

Since D.C. made no assignment to plaintiffs of any rights against Miller, however, it cannot be said that the money Miller received from the City was received at plaintiffs' expense[2]. As such, plaintiffs have no direct claim against Miller based on unjust enrichment principles.

IV. Conclusion

Therefore, the trial court erred in entering summary judgment in favor of plaintiffs on Counts II and III. Miller was entitled to summary judgment as a matter of law on Counts II and III, as well as on Count I[3].

The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion. Miller's request for an award of costs is denied.

/s/ Stanley A. Grimm, Judge

Harold L. Satz, P.J., and Gerald M. Smith, J., concur.

---

[2] Plaintiffs may have a cause of action against Miller under unjust enrichment principles to recover a portion of any salary plaintiffs paid to Miller while he was working on *D.C. and M.S. v. City of St. Louis*.

[3] We reiterate, our holding is limited to determining Miller's rights to the $8,090.25 as against plaintiffs. It should not be construed as a determination that Miller is entitled to the money as against D.C., the person to whom the award was expressly made.

IN THE CIRCUIT COURT OF THE
COUNTY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 559290
Team A

AMERICAN CIVIL LIBERTIES UNION/EASTERN MISSOURI FUND and AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI,
Plaintiffs,

v.

B. STEPHEN MILLER, III,
Defendant.

ORDER

The Court having considered the record and the arguments of counsel, and having determined that there is no genuine issue of material fact and that Plaintiffs are entitled to judgment as a matter of law, Plaintiffs' Motion for Summary Judgment in their favor on Counts I, II and III of their Second Amended Petition and on Counts I, II, III and IV of Defendant's Counterclaim is hereby GRANTED, and Plaintiffs are awarded their costs.

IT IS SO ORDERED.

/s/ B.C. Drumm, Jr.
Judge of the Circuit Court

Date: July 5, 1989

Proposed Order submitted by attorneys for Plaintiffs:

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IN THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI

21st Judicial Circuit

Case Number 559290
Team A - Division 4

ACLU, et al.,
Plaintiff,

vs.

MILLER,
Defendant.

Date: July 5, 1989

Defendant's cross-motion for summary judgment argued, submitted and denied. Depositions, exhibits to depositions, interrogatory answers, affidavits are received as part of the record for both the motion and the cross-motion for summary judgment.

SO ORDERED.

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/s/ B.C. Drumm, Jr.
Judge/Division

Supreme Court, U.S.
FILED
MAY 6 1991
OFFICE OF THE CLERK

(2)

No. 90-1568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN CIVIL LIBERTIES UNION/EASTERN MISSOURI FUND, a not-for-profit corporation, and LARRY KATZENSTEIN and JOYCE ARMSTRONG, as representatives of AMERICAN CIVIL LIBERTIES UNION, EASTERN MISSOURI, an unincorporated association,

Petitioners,

vs.

B. STEPHEN MILLER, III,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners' federal preemption claim is not properly before this Court because that claim was neither pressed nor passed upon in the courts of Missouri. In the Missouri Supreme Court, petitioners' principal argument was simply that, as a matter of state law, the circumstances of this case should not be deemed to fall within the prohibitions against fee sharing imposed by the public policy of Missouri, Mo. Rev. Stat. § 484.150 (1986), and Disciplinary Rule 3-102 of the Missouri Code of Professional Responsibility.

The only federal question ever raised in or decided by the courts of Missouri, and hence, the only one petitioners can advance here, is whether Missouri's prohibitions against fee sharing, as applied by the courts of Missouri to prevent petitioners from dividing court-awarded attorney fees with their former staff counsel, deprived petitioners of their rights under the First Amendment to the United States Constitution, where there was no genuine issue of material fact that:

(a) petitioners are both lay organizations which are independent and autonomous of the national ACLU, they are not legal aid offices or legal services agencies, they sponsor little litigation, they do not depend on attorney fee awards to support their activities, and, aside from respondent, they have never employed a staff counsel or sought to employ one;

(b) contrary to the practice and recommendation of the national ACLU, petitioners maintained no separate or segregated legal fund for litigation activities, but instead commingled what attorney fees they recovered in litigation with their general revenues, which were under the exclusive control of nonlawyers and which could be used to meet their general operating expenses;

(c) petitioners placed respondent under the direct supervision and control of their executive director, a lay person, and they

asserted, or reserved the authority to assert, actual control over the minimal litigation they did sponsor, including the litigation that gave rise to the fees at issue here;

(d) the legal fees sought by petitioners were awarded to respondent for legal services which he rendered on behalf of a third party, no portion of those fees was awarded for legal services performed by or on behalf of petitioners, and petitioners were not parties to the litigation which generated the fees; and

(e) petitioners recovered all costs they had advanced in the case which gave rise to the disputed fees, rejected respondent's express written offer to reimburse them for a proportional share of his salary and overhead attributable to that case, and instead sued respondent for the full fee award he had received, which was based on the market value of his services, not the actual amount he was paid by his employer.

PARTIES

Although petitioners identify themselves as "affiliates" of the national ACLU, they are, in fact, independent and autonomous of that organization. The national ACLU, incorporated in the state of New York, is not registered to do business in the state of Missouri, the jurisdiction from which this case arises. It played no role directly or indirectly in this case, or the events leading to this case, and is not bound by any judgments entered, or which may be entered, herein.

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No. 90-1568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN CIVIL LIBERTIES UNION/EASTERN MISSOURI FUND, a not-for-profit corporation, and LARRY KATZENSTEIN and JOYCE ARMSTRONG, as representatives of AMERICAN CIVIL LIBERTIES UNION, EASTERN MISSOURI, an unincorporated association,

Petitioners,

VS.

B. STEPHEN MILLER, III,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

BRIEF IN OPPOSITION

STATEMENT UNDER RULE 29.4(c)

Because this proceeding draws into question the constitutionality of Mo. Rev. Stat. § 484.150 (1986), a statute of the State of Missouri affecting the public interest, and neither the State of Missouri nor any agency, officer, or employee thereof is a party, petitioners should have noted in their petition for certiorari that 28 U.S.C. § 2403(b) may be applicable. They did not do so, and they have failed to serve a copy of their petition on the Attorney General of Missouri as required by Rule 29.4(c) of this Court.

STATEMENT OF THE CASE

The case now before the Court represents the culmination of an ongoing conflict between respondent and petitioners regarding the extent of lay control over the position of ACLU/EM staff counsel, a position which no longer exists and which has not existed since the summer of 1985. At issue is the disposition of $ 8,090.25 in attorney fees previously awarded to respondent by the United States District Court for the Eastern District of Missouri in a case styled *D.C. and M.S. v. City of St. Louis*, No. 84-1152C(3). The dispute over those fees was decided by the courts of Missouri on cross-motions for summary judgment. Respondent ultimately prevailed in both the Missouri Court of Appeals and the Missouri Supreme Court. The basic details of the case are set forth in the Missouri Supreme Court's opinion.[1] However, that court's decision was informed by a number of undisputed facts which either do not appear in the opinion itself or which were mentioned only in passing. Those facts shall be reviewed in more detail here.

Between 1982 and 1985, respondent was employed as staff counsel for the ACLU/EM (Miller Affidavit ¶ 3, L.F. 18), an unincorporated membership association which has no tax-exempt status under federal law. (Miller Affidavit ¶ 5, L.F. 19); see also Plaintiffs' Second Amended Petition ¶ 1, L.F. 72.) The ACLU/EM and the American Civil Liberties Union/Eastern Missouri Fund (the Fund), the other petitioner in this proceeding, are separate entities. (Answer No. 11(c) to Defendant's Interrogatories to Plaintiffs, L.F. 116; Plaintiffs' Second Amended Petition ¶ 1, L.F. 72.) Respondent has never been employed by the Fund,

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[1] Petitioners' statement of the case and their argument draw extensively from the dissenting opinion of Chief Justice Charles Blackmar. Justice Blackmar's opinion is rife with error, and his interpretation of the facts and law has not been accepted by any other judge who has considered the case on appeal.

nor has he ever entered into any contracts or other agreements with the Fund which purported to obligate him to pay it sums which he received as attorney fees for legal services rendered by him to third persons. (Miller Affidavit ¶ 4, L.F. 18-19.)

Like the Fund, the ACLU/EM is a lay organization. (Miller Affidavit ¶ 11, L.F. 20.) The majority of the ACLU/EM's members are not lawyers. It is governed by a board of directors whose members, with a few exceptions, are also nonlawyers. (Miller Affidavit ¶ 5, L.F. 19.) During the majority of respondent's tenure with the ACLU/EM, its president was not a lawyer. (Miller Affidavit ¶ 6, L.F. 19.)

The ACLU/EM employs an executive director who is in charge of its day-to-day operations. At all times relevant to this dispute, the executive director was Joyce Armstrong. Armstrong is not a licensed attorney or a law school graduate. (Miller Affidavit ¶ 7, L.F. 19; Answer No. 10 to Defendant's Interrogatories to Plaintiffs, L.F. 115.) At the time respondent worked as ACLU/EM staff counsel, Armstrong was his superior. Armstrong was authorized by the ACLU/EM board to exercise direct supervision and control over respondent's work, and she exercised that authority. (Miller Affidavit ¶ 8, L.F. 19; Miller Deposition, p. 50; Defendant's Deposition Exhibit A, p. A-4.)

Neither the Fund nor the ACLU/EM is a legal services agency. (Reply to Defendant's Counterclaim ¶ 2, L.F. 123; Miller Affidavit ¶ 11, L.F. 20.) Although respondent was employed by the ACLU/EM as staff counsel, much of his time was spent on activities which did not involve him in litigation. He had numerous administrative and clerical responsibilities. He made public appearances on behalf of the association, worked on legislation, and engaged in lobbying. (Miller Deposition, pp. 13-18; Defendant's Deposition Exhibit A, pp. A-3 - A-4.) Respondent was actually discouraged by the executive director from spending as much time as he did on litigation (Miller Deposition, pp. 53-54, 56), and at the time he left the ACLU/EM's employ,

proposals were pending which would have limited his involvement in litigation even further. (Miller Deposition, p. 82.)

The ACLU/EM maintained no separate legal department and employed no other attorneys on its staff at the time respondent worked there. (Miller Affidavit ¶ 9, L.F. 19.) Prior to respondent's employment as staff counsel, the ACLU/EM had no attorneys on its payroll. Subsequent to respondent's departure, the ACLU/EM hired no one to take his place as staff counsel (Miller Affidavit ¶ 10, L.F. 19), and petitioners have not claimed that they might now wish to hire another staff counsel at some point in the future.

From time to time the ACLU/EM does advance costs and pay expenses to support litigation brought by individuals who claim that their constitutional rights have been violated. The Fund, in turn, provides money to the ACLU/EM to help defray those costs and expenses. (Answer Nos. 25(a), (b), (c) to Defendant's Interrogatories to Plaintiffs, L.F. 116.) Nevertheless, the funding of such litigation represents a small fraction of their activities. Neither the ACLU/EM nor the Fund depends on attorney fee awards to support its activities. (Miller Affidavit ¶ 11, L.F. 20.)

The ACLU/EM had no segregated or separate fund or bank account to pay for litigation costs and expenses. The monies to pay those costs and expenses were drawn from the association's general funds or from the general funds of the Fund contained in their general bank accounts. The compensation paid to respondent by the ACLU/EM likewise came from the association's general funds, not from any segregated or separate litigation fund. (Miller Affidavit¶ 15, L.F. 21.) The only sense in which a litigation fund was maintained by petitioners was that their account books included a ledger sheet account for litigation expenses denominated as the "case budget account." (Miller Affidavit ¶ 16, L.F. 21.)

In cases where the ACLU/EM decided to provide funding for costs and expenses, the association would solicit a private

attorney to provide representation to the litigant whose position it supported. When respondent served as staff counsel, he also entered his appearance in the case as co-counsel, along with the private attorney, who was known as the "cooperating attorney." (Miller Affidavit ¶13, L.F. 20.) Respondents, however, did not give the attorneys a free hand over the litigation they sponsored. As previously noted, the ACLU/EM board expressly authorized the lay executive director to exercise direct supervision and control over respondent, the staff attorney, and she exercised that control. (Miller Affidavit ¶ 8, L.F. 19; Miller Deposition, p. 50; Defendant's Deposition Exhibit A, p. A-4.) On at least one occasion, the executive director actually undertook to negotiate a settlement of a pending case with the opposing side and their attorney. (Miller Affidavit ¶ 44, L.F. 28; Miller Deposition, p. 49; L.F. 33-35.)

In addition, only the lay executive director and the lay treasurer had authority to issue checks to pay for litigation expenses, and litigation costs and expenses in excess of $500 required the lay executive director's express prior approval. (Miller Affidavit ¶¶ 18-21, L.F. 21-22.) The ACLU/EM board exercised the right to reject settlement offers, even where settlement was recommended by counsel for the client. (Miller Affidavit ¶ 46, L.F. 29; Miller Deposition, p. 50.) The ACLU/EM also expressly reserved the right to terminate support for a case at any time if representation of a client's interests required taking an "anti-civil liberties position" or a "conflict of interest arose" (Plaintiffs' Deposition Exhibit 3 at 3-2), and it did, in fact, exercise that right at least once when it disagreed with counsel and the clients as to how the case should be handled. (Miller Affidavit ¶ 47, L.F. 29.)

In cases sponsored by the ACLU/EM, attorney fees were sometimes awarded by the courts for professional services rendered by the particular lawyers who actually handled the litigation. Virtually all of these awards were made pursuant to 42 U.S.C. § 1988. (Miller Affidavit ¶ 22, L.F. 22.) Because the ACLU/EM was a lay organization and not a party to the litiga-

tion, it could not make a claim for such attorney fees in its own name, and, during respondent's tenure as ACLU/EM staff counsel, it made no such claims. Without exception, attorney fees were paid directly to the individual attorneys who earned them. (Miller Affidavit ¶ 23, L.F. 22; Miller Deposition, pp. 21, 39-41.)

Prior to 1984, the ACLU/EM had no formal, written policy regarding the distribution of court-awarded attorney fees awarded to its staff counsel for professional services rendered by him on behalf of individual clients in cases for which the ACLU/EM had advanced litigation costs and expenses. Cooperating attorneys, however, were expected to turn over to the association all court-awarded attorney fees which they received in such cases. (Miller Affidavit ¶ 24, L.F. 22-23.) After he began working for the ACLU/EM, respondent understood that the association likewise expected him to surrender to it any court-awarded fees he received. (Miller Deposition, p. 20.)

In mid-1984, the ACLU/EM adopted a new policy regarding the disposition of court awarded attorney fees received by its staff counsel and by cooperating attorneys. That policy provided that staff attorneys "are encouraged to apply for and receive court-awarded fees to be paid by opposing parties, and all such fee awards are to be paid immediately over to the ACLU/EM." The policy further provided that any such fee awards obtained by cooperating attorneys normally had to be split 50-50 with the association. (Miller Affidavit ¶ 25, L.F. 23; Plaintiffs' Deposition Exhibit 13, section V., ¶¶ 2, 3, p. 13-3.)[2]

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[2] Responsibility for analyzing any legal problems with the new policy was assumed by St. Louis University Law School Professor Mike Wolff, the chairman of the ACLU/EM committee charged with revising the attorney fee policy. Wolff represented that there were no problems with the new policy. (Miller Deposition, pp. 75-77.) He failed to disclose to the committee or to respondent that the policy might be illegal or in contravention of the canons of ethics. (Miller Affidavit ¶ 26, L.F. 23.) His report to the ACLU/EM did not even address the subject. (Plaintiffs' Deposition Exhibit 12.)

Between 1982 and 1987, court-awarded fees were received by attorneys in seven cases in which the ACLU/EM had contributed money for costs and expenses. (Answer Nos. 25(a), (b), (c) to Defendant's Interrogatories to Plaintiffs, L.F. 116-17.) By far the largest single fee award, approximately $70,000, was made in *Burks v. Teasdale*. (Armstrong Deposition, p. 78.) All of this money was retained by the lawyer in the case. (Armstrong Deposition, p. 51.) In two instances, *Stokes v. Wyrick* and *Young v. Whaley*, all of the fees ($635.55) were paid over to the ACLU/EM by counsel. In three cases, the attorneys who had been awarded the fees and received payment divided the fee awards with the ACLU/EM. The remaining case, *D.C. and M.S. v. City of St. Louis*, is the proceeding which gave rise to this litigation, and it shall be discussed more fully below. In all of these cases except *Young v. Whaley*, the ACLU/EM received additional amounts for the costs and expenses it had advanced, above and beyond whatever share of the attorney fees it was given. (Answer Nos. 25(a), (b), (c) to Defendant's Interrogatories, L.F. 116-17.) Out of the monies so received, the ACLU/EM apparently then reimbursed the Fund for whatever money the Fund had advanced to it to defray the costs and expenses of the litigation. (*Id.*; Motion of Plaintiffs for Summary Judgment ¶ 4, L.F. 55.)

All court-awarded attorney fees which were paid over to the ACLU/EM under the aforementioned policies, both before and after 1984, were deposited in the association's general bank accounts or in the general bank accounts of the Fund. They were not deposited in any separate or segregated account or fund. The use of the fees so received was not restricted to litigation purposes. Rather, the fees were considered to be part of the organizations' general revenues and could be used to defray the organizations' general expenses. (Miller Affidavit ¶ 27, L.F. 23-24.)

Although the ACLU/EM is affiliated with the national ACLU in New York, the two organizations are autonomous and independent of one another. (Miller Affidavit ¶ 29, L.F. 24.) Unlike the ACLU/EM, the national ACLU maintains a separate legal department headed by a legal director who is an attorney. In addition, the national ACLU does have an express policy which requires that all attorney fees paid over to the ACLU by its staff counsel and cooperating attorneys be placed in a segregated account known as the "ACLU and ACLU Foundation Attorneys Fees Litigation Fund" and used "solely to support litigation and litigation-related activities." Although the national ACLU recommended that its affiliates establish similar litigation funds, neither the ACLU/EM nor the Fund established such a fund during respondent's tenure as staff counsel, and no such fund existed at the time the fees at issue in this case were awarded or paid. (Miller Affidavit ¶ 30, L.F. 24.)

Between 1984 and 1985, when he resigned from the ACLU/EM to begin work for the Illinois Appellate Court, respondent appeared as counsel of record in a case styled *D.C. and M.S. v. City of St. Louis*, No. 84-1152C(3) (U.S. District Court, E.D. Mo.). At the conclusion of that case, respondent and his co-counsel, Arlene Zarembka, applied for an award of attorney fees and costs pursuant to 42 U.S.C. §1988. The fee application and respondent's supporting affidavit indicated that respondent was employed as ACLU/EM staff counsel, but those documents did not purport to be submitted by or on behalf of either the ACLU/EM or the Fund. (See Plaintiffs' Deposition Exhibits 6 and 7.) Respondent's affidavit in support of the fee application specifically stated: "I am seeking compensation for myself at the rate of $75.00 per hour . . ." (Plaintiffs' Deposition Exhibit 7, p. 7-4, ¶ 10.)

After the fee application was submitted, respondent was required to withdraw his appearance in the case because his new job precluded him from appearing in court. (Miller Deposition, p. 94.) Following respondent's withdrawal, the U. S. District

Court granted the application, awarding $ 8,090.25 for the work performed by respondent. Notice of the award was made by the court to Arlene Zarembka, who remained counsel of record for the client, D.C., and Zarembka notified D.C. of the court's decision. (Miller Deposition, p. 37.)

Although the award was nominally made in the name of D.C., petitioners admitted in the circuit court that the effect of the court's order was to award the fees to respondent. In paragraph 7 of their motion for summary judgment petitioners expressly stated that "On September 25, 1985, the District Court awarded *defendant Miller* an attorney's fee of $ 8,090.25." (Emphasis supplied.) (L.F. 56.) That motion was verified and contained the oath of Alan Kohn, who swore that "all of the facts stated in this Motion are true and are based on undisputed evidence referenced in the Motion and contained in the record in this case." (L.F. 58.) Similarly, in their *Memorandum in Support of Plaintiff's [sic] Motion for Summary Judgment*, petitioners admitted that it was "defendant Miller" who applied for the fees (L.F. 59) and that "the Court awarded *defendant Miller* $ 8,090.25 in attorney fees." (Emphasis supplied.) (L.F. 60.)[3] The $ 8,090.25 awarded to

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[3] In the trial court, petitioners also suggested that because the ACLU/EM employed respondent at the time the fees were earned, the fee award should be deemed to have been made to it. (*Memorandum in Support of Plaintiff's [sic] Motion for Summary Judgment* at 4-6, L.F. 62-64). The problem with this theory is that it would have placed the ACLU/EM in violation of the Missouri statute prohibiting the unauthorized practice of law, Mo. Rev. Stat. § 484.020.2 (1986), and it was quickly abandoned.

In its place, petitioners argued for the first time on appeal that the fee award was actually made to respondent's client, D.C. They made this argument even though D.C. never claimed the fees himself and was not joined, or sought to be joined by petitioners, as a party in the case. In its opinion, the Missouri Supreme Court found this new theory to be unavailing. Appendix to *Petition for Writ of Certiorari* at A-7, fn. 4. ("[I]t is manifestly clear that the award is intended to compensate the attorney representing [D.C.] . . .")

respondent by the court represented compensation for 107.87 hours of work at respondent's market fee rate of $75 per hour. (Plaintiffs' Deposition Exhibit 8, p. 8-7.) It was not based on his actual rate of pay, which was only approximately $10 per hour.

Before the order awarding respondent the fees was entered, respondent learned of certain court decisions and Missouri Bar Advisory Committee opinions concerning the prohibition against sharing attorney fees with lay persons which applied to respondent's situation. (Miller Deposition, pp. 33-34.) At the time, respondent was not looking for materials on this subject. He happened to discover them in the course of doing research regarding proposals which were being made at the ACLU/EM to redefine the responsibilities of its staff counsel. (Miller Deposition, p. 34.) Respondent first became aware of these matters during the summer of 1985. (Miller Deposition, p. 107.)

Respondent discussed the materials he had found with Arlene Zarembka, his co-counsel in the *D.C. and M.S. v. City of St. Louis* case. Respondent and Zarembka concluded that turning their fee awards in that case over to the ACLU/EM in accordance with the association's fee policy would, in fact, be prohibited by the canons of ethics. (Miller Deposition , p. 33.) Even before they had received payment of the fees, they conveyed this conclusion to the ACLU/EM (Plaintiffs' Deposition Exhibits 9 and 10; Miller Deposition, p. 62) in an effort "to be open and honest about what [their] concerns were and what [they] thought the problems were" (Miller Deposition, p. 62). Although respondent advised the ACLU/EM that he could not turn over to it the $ 8,090.25 in fees he had been awarded because doing so would be illegal under Missouri law and would contravene the canons of ethics (Miller Affidavit ¶ 36, L.F. 26), he did make a written offer to the ACLU/EM to reimburse it for a proportional share of his salary, plus overhead attributable to the case. This offer was refused. (Miller Affidavit ¶ 50, L.F. 30.)

During the period prior to payment of the fee award, respondent also retained counsel to advise him on the matter. On the recommendation of his attorney, respondent contacted the attorney for the defendants in *D.C. and M.S. v. City of St. Louis*, Judith Ronzio. (Miller Deposition, p. 39.) Respondent's discussion with Ms. Ronzio concerned only how the checks for the fees and costs should be made payable as between respondent, his co-counsel, and the ACLU/EM, given the problem of improper fee sharing. Respondent informed Ms. Ronzio of the ethical problems posed by the division of the fee awards in the case and requested that the City issue three separate checks, one to Arlene Zarembka for her share of the fees, one to respondent for his share, and one to the ACLU/EM for the costs and expenses it had advanced in the case. (Miller Deposition, p. 39.)[4]

In December of 1985, the City of St. Louis issued a check to respondent in his name alone for the $ 8,090.25 in fees awarded to him by the court in the D.C. case. (Miller Affidavit ¶ 34, L.F. 25.) At the same time, the ACLU/EM received full payment of the $ 2,729.79 in costs and expenses it had advanced in the case. (Miller Affidavit ¶ 31, L.F. 25.) Issuance of separate checks to respondent and the ACLU/EM was not, however, the result of respondent's prior discussion with Ms. Ronzio. Ms. Ronzio informed respondent that the checks had been issued before she could take any action on the matter one way or another. A check was issued to respondent in his name alone in the ordinary course of business according to the City's standard procedures. (Miller Affidavit ¶ 49, L.F. 30.)

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[4] After petitioner advised respondents that he would not engage in improper fee splitting, respondents also contacted Ms. Ronzio themselves. They did so without the knowledge or consent of D.C., they did not purport to be acting on D.C.'s behalf, and they never mentioned any contractual agreement they had with D.C. Citing only their "policy," they demanded that the fees be paid directly to petitioner the Fund. (Armstrong Deposition at 77.)

The City's procedures were in conformity with the practice followed at the time by the federal court which awarded the fees. Under that practice, the parties obligated to pay fee awards made under 42 U.S.C. § 1988 were required to pay them to the attorneys who had earned them, not the individual clients. At a later stage of the same case which generated the fees here, the U.S. District judge expressly so held. (Miller Deposition at 40-41.) This procedure also conformed with the Missouri attorney fee lien statute, Mo. Rev. Stat. § 484.130 (1986), which provides:

> "From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosesoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment."

As soon as he received his check from the City, respondent turned all of the money over to his attorney for deposit in his attorney's client trust account. This happened on December 17, 1985. (Miller Affidavit ¶ 34, L.F. 25.) Two weeks later, on December 31, 1985, the Missouri Bar Advisory Committee issued an opinion, based on an inquiry drafted and submitted by the ACLU/EM's general counsel, which stated that "a staff attorney who is on salary to the American Civil Liberties Union and who is awarded attorneys fees cannot turn said fees over to the corporation." (Miller Affidavit ¶ 35, L.F. 26.) After this opinion was issued, neither the ACLU/EM nor the Fund contacted respondent or his attorney to make a claim for the $ 8,090.25 fee award, and respondent heard nothing further from those organizations until this suit was filed in 1987. (Miller Affidavit ¶ 37, L.F. 26.)

Arlene Zarembka, the other attorney for plaintiffs in the case of *D.C. and M.S. v. City of St. Louis*, No. 84-1152C(3) (U.S. District Court, E.D. Mo.) was also awarded attorney fees by the

court. She likewise refused to split her fee with the ACLU/EM or the Fund, although she was asked by those organizations to do so, and her refusal was based on the same considerations invoked by respondent. Ms. Zarembka's law firm subsequently made a charitable contribution of a portion of the fees to the ACLU/EM, but the amount so contributed was less than the full 50% claimed by the association. Nevertheless, the ACLU/EM and the Fund took no further action against Zarembka to recover the additional amounts they claimed she owed them. (Miller Affidavit ¶ 38, L.F. 26-27.)

In reliance on the failure of the ACLU/EM to pursue its claim against respondent or Ms. Zarembka after it had been fully apprised of that claim, and after a substantial period of time had passed, respondent believed that the matter had been dropped. His attorney ultimately returned the disputed fees to him from his client trust account (Miller Affidavit ¶ 39, L.F. 27; Miller Deposition, pp. 97-98), and respondent testified at his deposition that he paid tax on the fee award "on the assumption that no action would be taken and that . . . the money was [his]." (Miller Deposition, p. 103.) Following the trial court's ruling in 1989, the money was placed in a money market account in the joint names of counsel for petitioners and respondent. It remained there until the Missouri Supreme Court ruled in respondent's favor, at which time the parties agreed to transfer the money to the sole control of respondent's attorney until, *inter alia*, the proceedings before this court were concluded.

REASONS FOR DENYING THE WRIT

I. Petitioners are precluded from raising their preemption claim because that claim was not argued before or passed upon by the courts of Missouri.

Petitioners raised no federal preemption issue at any time in any fashion before any of the Missouri courts which have passed on this case. Nor was any preemption issue considered or decided, explicitly or implicitly, by the circuit court, the Missouri Court of Appeals, or the majority of the Missouri Supreme Court. The only mention of preemption anywhere below was in the dissenting opinion of Missouri's Chief Justice, who raised the matter *sua sponte*. Accordingly, the issue of preemption has not been properly presented for review by this Court and cannot be considered now. *Clark v. Jeter*, 486 U.S. 456, 459, 100 L.Ed.2d 465, 470 108 S.Ct. 1910, ____ (1988). (Preemption claim not "pressed or passed upon" in state court will not be decided on writ of certiorari.)[5]

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[5] Should the Court decide to deviate from this rule, petitioners' preemption claim must nevertheless be rejected. There can be no dispute that the regulation of the practice of law is a field traditionally occupied by the states. When a preemption question involves such matters, this Court begins its analysis "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947). Here, there is absolutely no indication that when Congress enacted 42 U.S.C. § 1988, it intended to supersede either the general power of the states to regulate attorneys, or their specific authority to restrict or prohibit fee sharing between lawyers and lay persons. Section 1988 is not addressed to any of these things. It controls only what a losing defendant must pay, *Venegas v. Mitchell*, 495 U.S. ___, 109 L.Ed.2d 74, 84, 110 S.Ct. ___ (1990), where a victim of a civil rights violation is represented by counsel, *Kay v. Ehrler*, 59 U.S.L.W. 4279 (U.S. April 16, 1991) (No. 90-79).

II. The decision of the Missouri Supreme Court is in full accord with the decision of every federal court which has directly considered state prohibitions against fee sharing in the context of federal fee shifting rules, and it does not conflict with the decisions of any other state.

In their Petition for Certiorari, petitioners contend that the decision of the Missouri Supreme Court is unprecedented and aberrational. This is completely wrong. State prohibitions on fee sharing have frequently been considered by the federal courts in the context of federal fee shifting rules, and the result has always been the same as that reached by the Missouri Supreme Court here. The federal courts of appeal have long held that organizations may directly recover full market court-awarded attorney fees (as were involved here) for work performed by their staff counsel on behalf of third persons only where those organizations are dedicated solely to litigation. *National Treasury Employees Union v. U. S. Department of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981). Petitioners here obviously do not meet this requirement. They are both lay organizations.

According to the federal courts, full market fee awards to lay organizations, even non-profit ones, are prohibited by the professsional canons against fee-splitting and aiding the unauthorized practice of law. *Id.* at 851-52. This rule (hereinafter referred to as the "*NTEU* rule" has been uniformly followed by the U. S. Court of Appeals for the District of Columbia, *see, e.g., Jordan v. U. S. Department of Justice*, 691 F.2d 514 (D.C. Cir. 1982); *Munsey v. Federal Mine Safety and Health Review Commission*, 701 F.2d 976 (D.C. Cir. 1983), *cert. denied sub nom. Smitty Baker Coal Company, Inc. v. Federal Mine Safety and Health Review Commission*, 464 U.S. 851, 78 L.Ed.2d 149, 104 S.Ct. 163, and by the U. S. Circuit Court for the Federal Circuit, *see, e.g., Goodrich v. Department of the Navy*, 733 F.2d 1578 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 1189, 83 L.Ed.2d 965, 105 S.Ct. 958 (1985); *Devine v. National Treasury Employees Union*, 805 F.2d 384 (Fed. Cir. 1986), *cert. denied sub*

nom. National Treasury Employees Union v. Horner, 484 U.S. 815, 98 L.Ed.2d 31, 108 S.Ct. 67 (1987); *PPG Industries v. Celanese Polymer Specialties Company*, 840 F.2d 1565, 1570 (Fed. Cir. 1988).

This rule, however, is not absolute. The court in *National Treasury Employees Union v. U. S. Department of the Treasury, supra,* indicated that the ordinary prohibition against full fee awards to lay organizations might be relieved if those fees were placed into a fund for the maintenance of legal services program. The rationale for such an exception is that such a distinct and separate legal services program would be the functional equivalent of a law firm, to which the ethical prohibitions against fee-splitting with lay organizations and encouraging lay persons or organizations to engage in the unauthorized practice of law would not apply. To invoke this exception, however, the lay organization would be required to demonstrate that all attorney fee awards it received would be paid into the legal program fund. No portion of the fee award could be diverted to use in supporting the the organization's general activities; all must be used exclusively for litigation. *Jordan v. U. S. Department of Justice, supra*, at 516 n. 14; *National Treasury Employees Union v. U. S. Department of the Treasury, supra* at 854-55. Correspondingly, all of the lay organization's legal work, including attorney salaries, witness fees, etc., would have to be paid entirely from the legal program fund. See *Goodrich v. Department of the Navy, supra*, at 1580.

The problem here is simply that petitioners are not the functional equivalent of a law firm, private, public or otherwise, and they meet none of the foregoing requirements. Moreover, petitioners have engaged in conduct which could be construed as the unauthorized practice of law (see Miller Affidavit ¶¶ 8, 18-21, 44-47, L.F. 19, 21-22, 28-29; Miller Deposition at 48-56), one of the very things the *National Treasury Employees Union* rule was designed to safeguard against. Under these circumstances, petitioners could still avail themselves of the fruits of the

federal fee shifting statute, but they were entitled only to be reimbursed for their actual financial outlays in the case at issue here. *National Treasury Employees Union, supra,* at 853. As noted by the Missouri Supreme Court, however, they have already been fully reimbursed for all of the costs and expenses they claimed in that case, they rejected an offer by respondent to reimburse them for a proportional share of his salary and overhead attributable to the case, and they abandoned any claim for such reimbursement in this litigation.

Petitioners' attempt to distinguish *National Treasury Employees Union v. U. S. Department of the Treausry* before the state courts was without foundation. Although *NTEU* involved a labor union, the court's decision expressly addressed its applicability to other types of organizations. The court made clear that the applicability of its holding turns not on whether an organization is profit-making or not-for-profit, nor does it turn on what the purposes of the organization are. The primary consideration is whether it is a lay organization or one devoted solely to litigation. *Id.* at 854-55.

Accordingly, the principles articulated in *NTEU* have been applied to various "public interest" organizations, not simply unions. *See, e.g., Jordan v. U. S. Department of Justice, supra,* which involved fee awards to the Institute for Public Representation at the Georgetown University Law Center; and *Wilderness Society v. Morton*, 495 F.2d 1026, 1037 (D.C. Cir. 1974 *en banc), rev'd on other grounds sub nom. Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975), a precursor to *NTEU*, which involved an award of fees to attorneys for the Wilderness Society, Environmental Defense Fund, Inc., and Friends of the Earth ("the [fee] award must go to counsel, rather than to the organizations which pay their salaries").

Although there are cases in which courts have awarded fees directly to the ACLU, *see, e.g., Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974); *Howard v. Phelps*, 443 F. Supp. 374

(E.D. La. 1978), those cases pre-date the rule developed in *NTEU* and its progeny; they give no indication of how the particular ACLU units or affiliates involved were organized or operated; and they did not purport to decide or even consider the question of whether such payments might be illegal and unethical. They are of no value to petitioners here.

Since the advent of *NTEU* and *Jordan*, the requirements of those cases have actually been applied to the Nebraska affiliate of the ACLU by the advisory opinion committee of that state's bar association, and to the ACLU's Florida affiliate by the bar association there. Simon, *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L. J. 1069 at 1097 (1989). Petitioners have not cited, and respondent has not found, a single state court decision which has ruled in a way that conflicts with the decision of the Missouri Supreme Court here.

As indicated in the statement of the case, even the national ACLU has structured itself to comply with *NTEU*'s requirements and has recommended that its affiliates do likewise. It has adopted this structure without any apparent ill effect or complaint. A similar change would work no hardship on petitioners. To the contrary, Thomas Blumenthal, the ACLU/EM's president, has conceded publicly during the course of these appeals that the creation of the necessary legal fund would have no practical effect on the way the organization is set up now, and, in his words, "if that's what we have to do, we'll do it." St. Louis Post-Dispatch, June 18, 1990, section B, page 1.

III. The Missouri Supreme Court was clearly correct in rejecting petitioners' First Amendment claim.

Petitioners have never disputed that the legal and ethical prohibitions against fee splitting are valid, on their face, under the United States Constitution. In the courts of Missouri, petitioners contended only that those prohibitions, as applied to them, violate the First Amendment. This contention is completely

spurious. During four years of litigation this case has been considered in one way or another by some twenty judges, including the circuit judge, the three-judge panel of the Missouri Court of Appeals, the full Missouri Court of Appeals (who had to rule on petitioners' application for rehearing or transfer), and the seven members of the Missouri Supreme Court. Of these, only Chief Justice Blackmar has been able to articulate any reasons which support petitioners' cause of action. Not even Blackmar, however, could abide petitioners' First Amendment claim.

Indeed, petitioners' First Amendment claim fails even under the analysis advanced by one of their own counsel, Roy Simon, in his article *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L. J. 1069 at 1132 (1989). That analysis construes existing case law as holding that First Amendment protection should be extended to financial agreements between lawyers and public interest organizations whenever those arrangements are "integral" to the organization's purposes. According to petitioners' counsel, "[i]f fee-sharing agreements are integral to the litigation programs of public interest groups . . . then fee sharing arrangements fall within the protection of the First Amendment." *Id.* at 1121. Assuming, for the sake of argument, that this is so, no such claim can be made here.

Under the foregoing analysis, fee sharing between a staff attorney and the public interest organization that employs him would be regarded as "integral" to that organization only if the organization's protected purposes would be significantly frustrated if such fee sharing were disallowed. *Id.* at 1121 n. 298. Petitioners could make no such claim here. Nothing in the statutes or rules forbidding fee sharing prohibits petitioners from continuing to provide financial support to litigation brought by third parties in order to advance the organizations' political and ideological goals. Nor do those statutes and rules limit in any way the right of petitioners to obtain full reimbursement for the actual costs and expenses which they have so advanced, and they

have complete freedom to use the funds reimbursed to them for any purpose they so choose.

As the previous discussion has shown, the only consequence to petitioners of prohibiting them from sharing fees with their staff attorney would be to prevent them from recovering full market fees for the legal services which that attorney provided to third parties. The undisputed evidence established, however, that, with the exception of respondent, petitioners have never even employed a staff counsel (Miller Affidavit ¶10, L.F. 19); that respondent himself had only limited involvement in litigation during his tenure as staff counsel for the ACLU/EM, and at the time he left its employ proposals were pending which would have restricted that involvement even further; that the funding of litigation represents but a small fraction of the petitioners' endeavors (Miller Affidavit ¶11, L.F. 20); and that petitioners do not even depend on attorney fee awards to support their activities (*id.*). Under these circumstances, it is difficult to see how preventing petitioners from sharing fees with their staff counsel will have any impact on them at all. Accordingly, fee sharing with staff counsel is in no way "integral" to petitioners' activities, and its prohibition therefore offends no First Amendment values.

Petitioners cannot manufacture a First Amendment violation by advancing hypothetical situations which have no basis in the record. That the prohibitions against fee sharing might have "chilling effects" on other groups or under different circumstances from those present here is of no consequence. Even in free speech cases, where concerns about the chilling of protected expression have given rise to "overbreadth" analysis, this Court has now recognized that petitioners must generally still show that the challenged statute is unconstitutional as applied to them, not merely that it may be interpreted to authorize unconstitutional acts. *Van Zandt v. Thompson*, 839 F.2d 1215, 1218 (7th Cir. 1988), *citing Brockett v. Spokane Arcades, Inc.*, 472 U.S.

491, 501-04, 86 L.Ed. 394, 105 S.Ct. 2794, 2801-02 (1985). As this Court reiterated in *Brockett*, 472 U.S. at 502, 86 L.Ed. at 404, *quoting United States v. Raines*, 362 U.S. 17, 4 L.Ed.2d 524, 80 S.Ct. 519,

> "* * * one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or situations in which its application might be unconstitutional."

No ruling by this Court supports petitioners' First Amendment argument. In his article on fee sharing, petitioners counsel, Roy Simon has, in fact, acknowledged that "the Supreme Court has never expressly extended First Amendment protection to fee-sharing arrangements with nonprofit groups." "On the contrary," he writes, "the Court has repeatedly refused to decide whether fee-sharing agreements fall within the First Amendment's scope." Simon, *Fee Sharing Between Lawyers and Public Interest Groups*, 98 Yale L. J. 1069 at 1121 (1989).

In an attempt to give some legitimacy to their claim petitioners cite *In Re Primus*, 436 U.S. 412, 56 L.Ed.2d 417, 98 S.Ct. 1893 (1978), but that decision is not dispositive of any issue in this case. *In Re Primus* did not purport to consider whether a staff attorney could constitutionally be prohibited under state law from sharing court-awarded attorney fees with his lay employer under circumstances analogous to those present here. Unlike the case *sub judice*, there was no showing in *In Re Primus* that the ACLU entities ran afoul of the rules against lay interference in litigation or unauthorized practice of law. The case did not involve a staff attorney. It did not involve the sharing of attorneys fees awarded by a court under 42 U.S.C. § 1988. (At the time of the events giving rise to the case, 42 U.S.C. § 1988 did not even exist.) Indeed, it did not involve fee sharing at all. The only question in the case was whether an ACLU cooperating attorney in South Carolina could be sanctioned for soliciting

clients for litigation to be funded by that organization. Such solicitation has nothing to do with the dispute now before this Court.[6]

Nor can petitioners find support for their position in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 L.Ed.2d 723, 100 S.Ct. 2024 (1980). In a footnote in that decision, this Court did hold that the respondent's representation by attorneys from a public interest group was not a "special circumstance" that would result in denial of counsel fees, 64 L.Ed.2d at 738 n.9, but that is not the issue here. There is no question that a fee award could be made in the case which generated the fees at issue here. The problem posed by this litigation is, instead, who is entitled to retain the fees once they have been awarded, given the legal and ethical prohibitions against fee splitting. This is a problem which this Court neither raised nor addressed in *New York Gaslight Club, Inc., supra.*

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[6] That *In Re Primus* does not support petitioners' position has also now been acknowledged by their counsel Roy Simon. Although petitioners argued before the circuit court that *In Re Primus* "'specifically discussed and disposed of the precise issue here involved — whether the ACLU can sponsor litigation and then keep awarded fees that such litigation generates" (*Memorandum in Support of Plaintiff's [sic] Motion for Summary Judgment*, L. F. 61), Simon reached exactly the opposite conclusion in his article on fee sharing. In that article he stated that "Primus itself did not discuss the fee-sharing rule, and thus left open the precise issues addressed in this Article." Simon, *Fee Sharing Between lawyers and Public Interest Groups*, 98 Yale L. J. 1069 at 1081 n. 59. Later, Simon likewise observed that "the situation in Primus did not involve fee sharing per se, the state did not charge Ms. Primus with violating the fee-sharing rule, and the Court never mentioned the rule against sharing fees with nonlawyers." *Id.* at 1122. Later still, Simon concluded that "the Primus case did not address the situation of the full-time staff attorney who has agreed to turn over all court-awarded fees to the organization. Primus, therefore, does not definitively establish comprehensive First Amendment protection for fee-sharing arrangements with public interest groups." *Id.* at 1123.

Evans v. Jeff D., 475 U.S. 717, 89 L.Ed.2d 747, 106 St. Ct. 1531 (1986) was not decided until after the fee award here had become final, involved no constitutional question, and adds nothing to this case. The issue in *Evans v. Jeff D.* was whether the district judge had abused his discretion in approving a settlement which called for the waiver by counsel of any claim to statutory attorney fees or costs. In ruling that no abuse of discretion occurred, this Court noted that fee awards under 42 U.S.C. § 1988 may be waived by the client. From this, petitioners reason that if a client has the right to waive a fee entirely, it necessarily follows that he has the unfettered right to dispose of any fees which are awarded however he pleases. This is simply not so. The waiver of fees by a client does not implicate the prohibitions against the unauthorized practice of law by lay persons or lay interference with an attorney's independent professional judgment. The prohibitions against fee sharing do. *National Treasury Employees Union v. U. S. Department of the Treasury*, 656 F.2d 848, 851-52 (D.C. Cir. 1981); *Committee on Professional Ethics v. Lawler*, 342 N.W.2d 486, 488 (Iowa 1984); ABA Informal Opinion 86-1519 (April 18, 1986) WESTLAW DATABASE LS-ABAEO (rule is "protection against encouraging persons not authorized to practice law to engage in the unauthorized practice of law"); *O'Hara v. Ahlgren*, 127 Ill.2d 333, 342, 537 N.E.2d 730, 734 (Ill. 1989); Comment, ABA Model Rules of Professional Conduct Rule 5.4 (1983) ("[t]hese limitations are to protect the lawyer's professional independence of judgment").[7]

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[7] Petitioners cite earlier authorities which advance different reasons for the original prohibitions against fee sharing in an attempt to argue that the prohibitions should not apply here because the reasons for the rule are absent. This argument is completely without merit. The reasons listed here are the ones which are, in fact, advanced in support of the current fee sharing rules, rules which have been retained and modified as groups such have petitioners have appeared on the scene. In any case, the Missouri Supreme Court has

(Footnote 7 continued on next page)

N.A.A.C.P. v. Button, 371 U.S. 415, 9 L.Ed.2d 405, 83 S.Ct. 328 (1963), likewise does not support petitioners' position. Like *In Re Primus*, it involved the constitutionality of solicitation rules, not rules against fee sharing. Moreover, plaintiffs fail to recognize that even under *Primus* and *Button*, the First Amendment would not prevent the state from prohibiting fee sharing with a lay organization where, as here,

(1) that organization exerts control over actual litigation or otherwise interferes with the attorney-client relationship, see *Primus, supra*, 436 U.S. at 439, 56 L.Ed.2d at 439, *citing Button, supra*, 371 U.S. at 447, 9 L.Ed.2d at 426-27, 83 S.Ct. at 345 (White, J., concurring in part and dissenting in part) ("neither the practice of law by [a lay] organization nor its management of the litigation of its members or others is constitutionally protected); see also *Lawline v. American Bar Association*, 738 F. Supp. 288, 296 (N.D. Ill. 1990) (ABA Model Code prohibitions on aiding nonlawyers in the unauthorized practice of law do not violate any First Amendment guarantees) or

(2) a conflict of interest may exist between the lay organization and the party to whom funds are being furnished for litigation, *Button, supra*, 371 U.S. at 443, 9 L.Ed.2d at 424; *Primus, supra*, 436 U.S. at 436, 56 L.Ed.2d at 437.

Petitioners protest that they never actually asserted control over litigation or interfered with the attorney-client relationship. This is false. The undisputed evidence established exactly the opposite. Even in the case which gave rise to the disputed fees here, there was trouble with lay interference when, for example,

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(Foonote 7 continued)

squarely held that the state fee sharing prohibitions do apply under the circumstances present here, and this Court must accept its construction of the law. *Kingsley Corp. v. Regents of University of N.Y.*, 360 U.S. 684, 688, 3 L.Ed.2d 1512, 1516, 79 S.Ct. 1362 (1959).

the time came to order transcripts for the appeal. (Miller Deposition, p. 52.)

Petitioners likewise cannot deny that conflicts of interest have arisen between petitioners and the individuals whose causes they purport to champion. The existence of such a conflict was recently observed by Justice Welliver of the Missouri Supreme Court in his dissenting opinion in *State v. Walsh*, 713 S.W.2d 508, 513-14 (Mo. *en banc* 1986), when he wrote: "I fear that respondent is more hurt than helped by his friends, the amici [including the ACLU/EM], who I believe are more interested in establishing constitutional protections for homosexuals than in securing the freedom of this individual . . ."

The problem of a conflict of interest was also reflected in the retainer agreement in the very litigation which generated the fees at issue here. That agreement expressly provided that the ACLU/EM could terminate its involvement in the case at any time if, *inter alia*, "representation of [D.C.'s] interests require[d] taking an anti-civil liberties position" or "a conflict of interest [arose]." (Plaintiffs' Deposition Exhibit 3 at 3-2.) No limitation was placed as to when this right of termination could be exercised, and no consideration was made by petitioners for the prejudice which such termination might work on the rights of the client.

Petitioners also overlook that proof of actual lay control or interference is not required, nor is proof of an actual conflict of interest. Even under *Primus*, 436 U.S. at 436, 56 L.Ed.2d at 437, all that is necessary is that there be proof of a "serious danger" of conflict of interest or of organizational interference with the conduct of litigation.

Petitioners cannot seriously dispute that such a "serious danger" existed here, given the undisputed facts that:

(1) the ACLU/EM board expressly authorized the lay executive director to exercise direct supervision and control over respondent, the staff attorney, and she exercised that control

(Miller Affidavit ¶ 8, L.F. 19, Miller Deposition, p. 50; Defendant's Deposition Exhibit A, p. A-4);

(2) only the lay executive director and the lay treasurer had authority to issue checks to pay for litigation expenses, and litigation costs and expenses in excess of $500 required the lay executive director's express prior approval (Miller Affidavit ¶¶ 18-21, L.F. 21-22);

(3) the ACLU/EM board exercised the right to reject settlement offers, even where settlement was recommended by counsel for the client (Miller Affidavit ¶46, L.F. 29; Miller Deposition, p. 50);

(4) the lay executive director, on at least one occasion, personally undertook to negotiate a settlement of a pending case with the opposing side and their attorney (Miller Affidavit ¶ 44, L.F. 28; Miller Deposition, p. 49; L.F. 33-35);

(5) the ACLU/EM expressly reserved the right to terminate support for a case at any time if, as noted above, representation of a client's interests required taking an "anti-civil liberties position" or a "conflict of interest arose," (Plaintiffs' Deposition Exhibit 3 at 3-2), and it did, in fact, exercise that right at least once when it disagreed with counsel and the clients as to how the case should be handled (Miller Affidavit ¶ 47, L.F. 29); and

(6) the ACLU/EM had a direct financial incentive to compromise a client's claim in order to secure a fee award in that any attorney fees paid over to the ACLU/EM in cases it supported would directly enrich the association's general coffers and could be used for any purpose (Miller Affidavit ¶ 27, L.F. 23-24), including, *e.g.*, paying rent, utilities, and even overdue catering bills. Those fees did not have to be and were not placed in any separate fund for litigation. No such fund existed. (Miller Affidavit ¶¶ 15, 16, L.F. 21.)

For these reasons, this is not a case where the First Amendment is implicated at all. Even if it were, however, petitioners' First Amendment analysis would still fail. Petitioners have suggested, for example, that the legal and ethical prohibitions against fee sharing are overbroad. Overbreadth analysis, however, is involved where a statute is claimed to be facially invalid, a claim which petitioners' here have not made.

In any case, there is no authority for such a characterization in this case, and even if there were, it would not matter. While Justice Brennan alluded to the overbreadth doctrine in his majority opinion in *Button, supra*, 371 U.S. at 433, 9 L.Ed.2d at 418, mere overbreadth is no longer sufficient to justify invalidating a statute on its face. Before a statute will be declared invalid on its face under the First Amendment, this Court now requires that the overbreadth be *substantial*. *Brockett, supra*, 472 U.S. at 503-04, 86 L.Ed.2d at 405-06. Petitioners have never claimed or established substantial overbreadth here.

There is another reason why *N.A.A.C.P. v. Button* is of no help to petitioners. The solicitation statute struck down in that case was not content neutral. As Justice Douglas noted in his concurring opinion, the statute at issue in that case was specifically enacted as part of a massive plan to thwart the N.A.A.C.P. and others in their efforts to integrate the public schools. 371 U.S. at 445-46, 9 L.Ed.2d at 425-26. No similar situation is present here. There is no dispute that the legal and ethical prohibitions against fee sharing, in their promulgation and application, have nothing whatever to do with the particular views petitioners or anyone else might wish to convey. Those prohibitions, by definition, are therefore content neutral. As this Court recently held in *Ward v. Rock Against Racism*, 491 U.S. 781, 105 L.Ed.2d 661, 675, 109 S.Ct. 2746 (1989):

> "The principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of

> speech because of disagreement with the message it conveys. [Citation.] * * * A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. [Citation.]"

Because the legal and ethical prohibitions against fee sharing are content neutral, they need not serve a compelling state interest in order to withstand First Amendment scrutiny. All that is required is that they further a substantial state interest. Note, *The Content Distinction in Free Speech Analysis After Renton*, 102 Harv. L. Rev. 1904, 1906 (1989); *Ward v. Rock Against Racism, supra*, 105 L.Ed.2d at 678-79. This Court has long recognized that the state has a substantial interest in regulating the practice of law, *Sperry v. Florida*, 373 U.S. 379, 383, 10 L.Ed.2d 428, 433, 83 S.Ct. 1322 (1963), and, as previously discussed, the fee-sharing prohibitions serve this interest by helping to prevent the unauthorized practice of law and by protecting a lawyer's independent professional judgment from lay interference.

Petitioners nevertheless seem to suggest that the legal and ethical prohibitions against fee sharing should be swept aside because there are less restrictive alternatives for accomplishing the same ends. Specifically, petitioners appear to argue that the goals of preventing the unauthorized practice of law and protecting a lawyer's professional judgment can be adequately achieved by enforcing specific provisions of the Rules of Professional Conduct which deal with those matters (see Rules 1.8 and 5.4(c) of Missouri Supreme Court Rule 4) and that the additional prohibition against fee sharing is unnecessary. There is no basis for this claim.

Petitioners have not cited, and respondent cannot find, a single instance in which any state has found it sufficient to simply prohibit the unauthorized practice of law or to outlaw lay interference in litigation without also banning fee sharing. The

considered judgment of state bar authorities, courts, and legislatures appears to be in complete accord on this point. The prohibition against fee sharing is not simply some useless appendage. To the contrary, it is precisely what makes the ban against the unauthorized practice of law and the prohibition against interference with a lawyer's judgment work. If any of these rules are indispensable, it is this one.

But there is a more basic flaw in petitioners' argument: "less restrictive alternative analysis" does not even apply here. Under present Supreme Court jurisprudence, the prohibitions must be narrowly tailored to serve the government's legitimate content-neutral interests, but they need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved *less effectively* absent the regulation. *Ward v. Rock Against Racism*, 105 L.Ed.2d at 679-80. There can be no serious dispute that the challenged prohibitions against fee sharing satisfy this standard. Petitioners' First Amendment challenge was therefore properly rejected.

IV. The Missouri Supreme Court's decision is not likely to have any impact beyond this immediate dispute.

In the proceedings below, petitioners adduced no evidence which suggested that the court's decision will affect anyone other than the immediate parties to this proceeding. There was certainly no proof that it will adversely affect other ACLU affiliates. Based on the reported decisions, the issue of fee sharing between those affiliates and their staff attorneys has evidently not had to be pressed anywhere else, and given the national ACLU's admonition to the affiliates to restructure their legal programs, there is no reason to believe that it may arise in the future.

The challenged decision of the Missouri Supreme Court does not purport to address the validity of any fee-sharing arrangements save the one between petitioners and their staff counsel. As this brief has repeatedly noted, however, petitioners no longer have a staff counsel, they have not had one since the summer of 1985, and they have never claimed that they might wish to have one in the future. Moreover, there are no further cases pending in which respondent stands to receive court-awarded fees for work he performed while in the ACLU/EM's employ. For petitioners here, the sweeping constitutional issues presented are thus entirely academic. Their only loss is a one-time money judgment of $ 8,090.25. In the end, that is all this case is about.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 90-1568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN CIVIL LIBERTIES UNION/EASTERN MISSOURI FUND, a-not-for-profit corporation, and LARRY KATZENSTEIN and JOYCE ARMSTRONG, as representatives of the AMERICAN CIVIL LIBERTIES UNION, EASTERN MISSOURI, an unincorporated association,

Petitioners,

VS.

B. STEPHEN MILLER, III,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Missouri

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

1. The Importance of the Decision Below[1]

No non-profit sponsor of litigation, regardless of its structure and point of view, regardless of whether its lawyers are volun-

[1] The opinion of the Supreme Court of Missouri is now reported at 803 S.W.2d 592.

teers or on staff, may ever accept a prevailing party's assignment of § 1988 fees under the decision below. None.

This, and nothing narrower, is what the Missouri Supreme Court held.

The court below has taken a fee-sharing ethics rule, originally adopted by the American Bar Association in 1908, and a state statute[2] originally adopted in 1915, and used them to encroach absolutely on a federally guaranteed means — fee-shifting — for securing federally guaranteed rights.

No change in the way Petitioners or like groups operate can possibly avoid the state court's categorical prohibition. As a result, some cases they could once have afforded to accept will be turned away. This is simple economics. The fee-shifting awards that Congress granted to certain prevailing parties will no longer be fully negotiable.

The consequences will be national. The public interest, volunteer and *pro bono* bars are put painfully on notice that, despite this court's emphatic and persistent constitutional view from *Button* to *Primus*, the states are once again free to set up ancient champerty laws against the First Amendment right "to petition the Government for a redress of grievances" and the facilitative goals of federal fee-shifting statutes.

This prospect, and the overhanging threat of professional condemnation, will inhibit cautious lawyers everywhere.

For these reasons, this is an important case that should be reviewed.

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[2] Because a state statute is involved, Petitioners, pursuant to Rule 29.4(c) of this Court's Rules, have stated by letter dated May 7, 1991, addressed to the Attorney General of the State of Missouri, that 28 U.S.C. § 2403(b) may be applicable. Enclosed with the letter were copies of the Petition and the Brief in Opposition.

2. The Constitutional Issue and the Applicability of *Button and Primus.*

Respondent refuses to come to grips with the applicability of *Button* and *Primus*. He argues that those cases involve solicitation, not fee sharing, and that the decision below is correct because it is in accord with *National Treasury Employees Union (NTEU) v. U.S. Department of Treasury*, 656 F.2d 848 (D.C. Cir. 1981), and cases like it. Both contentions are analytically flawed.

Respondent offers no explanation why a blanket ban on fee-sharing is less constitutionally suspect than a blanket ban on solicitation. Rules on solicitation and fee-sharing are inextricably intertwined. The *ratio decidendi* of *Primus* was that *precisely because* the fee award would go to the ACLU, the solicitation did not take on a commercial taint and enjoyed constitutional protection. *In re Primus*, 436 U.S. 412, 429-431 (1978). "[T]he entire arrangement," both the fee arrangement and the solicitation, employed constitutionally privileged means of expression to secure constitutionally guaranteed civil rights. *See NAACP v. Button*, 371 U.S. 415, 442 (1963), and the Petition at pp. 13-16.

This critical distinction between civil liberties litigation and commercial litigation was recognized by this Court in *Ohralik v. Ohio State Bar Ass'n.* 436 U.S. 447 (1978), decided the same day as *Primus*. Under *Primus*, civil liberties litigation and the fees it generates have constitutional protection; under *Ohralik*, commercial litigation does not.

Decisions such as *NTEU, supra,* and *Curran v. Department of the Treasury*, 805 F.2d 1406 (9th Cir. 1986), actually support Petitioners because they uphold the position that non-traditional sponsors of litigation can receive legal fees. Indeed, the ABA, under its own interpretation of the fee-sharing rule, tolerates a lay sponsor of a *for-profit* prepaid legal service plan to share legal

fees with participating lawyers. *ABA Formal Ethics Opinion 87-355* (December 14, 1987). Although *NTEU* imposes a modest restriction on the handling of court-awarded fees (a restriction "unprecedented in the arena of ethical standards" (*Curran, supra* at 1408 n.1)), it in no way supports the constitutional decision below, which upholds the total bar on fee-sharing found in Missouri's statute and court rule and erroneously rejects "the fair intendment" of *Button* and *Primus* (dissenting opinion of Chief Justice Blackmar, Petition, Appendix A-20).

3. The Statutory Preemption Issue

Respondent cites this Court's decision in *Clark v. Jeter*, 486 U.S. 456, 459 (1988), for the proposition that this Court "cannot" consider issues not pressed below (Brief in Opposition at p. 14). While the Court need not consider such an issue, most assuredly it can and has considered federal issues not pressed below where, as here, a constitutional question is properly presented and the case may be decided on a narrower federal statutory issue not raised below but which is a necessary element of the broader constitutional issue (*see* cases and authorities cited at page 18, footnote 7, of the Petition).

On the merits, Respondent's sole argument against preemption is that there is no congressional history indicating an intent to supersede a state's power to regulate fee sharing. Such an argument widely misses the mark. Here, state law is preempted because it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress" when it enacted § 1988. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991) (ethical rule regarding court costs frustrates, and is therefore preempted by, Rule 23 of the Federal Rules of Civil Procedure); *County of Suffolk v. Long Island Lighting Co.*, 710 F.Supp. 1407, 1415 (E.D.N.Y. 1989) ("[T]o the extent the enforcement of a state ethics rule might frustrate congressional ends, the Supremacy Clause would be a bar to any such enforcement").

4. Respondent's Misstatement of the Case

This case *does not* turn on the particulars of how Petitioners' office operates, and the court below did not rely on such details in making its far-reaching decision. Nevertheless, some of the many argumentative, immaterial and incorrect facts alleged in Respondent's Brief in Opposition require an answer.

A good example of distortion is Respondent's red-herring statement that this case is "the culmination of an ongoing conflict. . .regarding the extent of lay control over the position of ACLU/EM staff counsel" (Brief in Opposition, p. 2). There was no such conflict in the courts below. Because there was no genuine issue of material fact, this matter was decided on cross-motions for summary judgment, and no judge deciding the case below ever stated that there was a conflict relating to lay control. Indeed, the record fails to show that Respondent ever complained of lay control or lay interference with the professional judgment that he exercised in the underlying litigation in federal court or in any other case in which he was involved. Nor could he since the Executive Director of Petitioners testified that she "never made a decision on pending litigation," never decided on the appropriate use of funds for litigation, and never negotiated any settlements (Armstrong Depo. pp. 43, 46). There simply is no question of lay interference presented by the facts of this case, and, as in other cases decided by this Court, it is not an issue here. *NAACP v. Button,* 371 U.S. 415, 441, 442-444 (1963) (lay interference not applicable); *United Mine Workers v. Illinois State Bar Ass'n,* 389 U.S. 217, 223 (1967) (lay interference not applicable because only "a distant possibility").

Apparently relying on his own rambling, self-serving and mostly hearsay affidavit filed the day of the hearing in the Circuit Court (and, as observed by the dissenting opinion below, not usable under Missouri law to support Respondent's Motion for Summary Judgment (Petition, Appendix A-26)), Respondent

implies that the national ACLU and its affiliates, other than Petitioners, have separate litigation funds controlled solely by lawyers and usable only for litigation purposes (Brief in Opposition, pp. 8, 29). That suggestion is untrue. Like many other public interest organizations, the national ACLU's litigation fund is controlled by a board consisting of both lawyers and non-lawyers, and fund balances may be transferred into the general fund of the ACLU Foundation. Moreover, all of the 47 ACLU affiliates surveyed by Petitioners allow litigation proceeds to be controlled by lawyers and non-lawyers, and at least 33 of the affiliates may use the proceeds for general purposes. *Exhibits C and D to Petitioners' Supplemental Brief filed in the Supreme Court of Missouri.*[3]

Finally, the factual emptiness of Respondent's position is demonstrated by his continued reliance on the disingenuous contention that he, rather than his client, was awarded the fee judgment in this case (Brief in Opposition at p. 9). The undisputed documentary evidence in the record is that Respondent's *client* was awarded the judgment, as required by 42 U.S.C. § 1988 (fee to be awarded to the "prevailing party"). The courts below properly rejected Respondent's hollow argument to the contrary (based on an inadvertent, conclusory statement in one of Petitioners' pleadings), and properly found as an undisputed material fact that the fee awarded was entered in favor of the client, not Respondent (Petition, Appendix A-2, A-12, A-31). That unassailable fact was one of the reasons Chief Justice Blackmar was "shocked" by Respondent's "dishonorable conduct" of "help[ing] himself to the money" which belonged to Respondent's client and which the client had assigned to Petitioners. (Petition, Appendix A-12, A-13, A-16.)

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[3]This information was presented in the court below in accordance with the Brandeis brief concept. *See Muller v. Oregon*, 208 U.S. 412, 421 (1908). Respondent moved to strike the information, but the Supreme Court of Missouri ignored his request, and the data remain in the record.

Conclusion

For the reasons stated in the Petition and in this Reply, it is respectfully submitted that the Court should grant the petition for a writ of certiorari.

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